Supreme Court, U. S.
FILED
APR 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 5

Reasons for Granting the Writ 11

I—The Decision Below With Respect to the Tolling Effect of the Filing of an EEOC Charge Conflicts With Other Court of Appeals Decisions on an Issue Having Serious Implications For the Effectiveness of Title VII and Judicial Administration of Important Federal Statutes 13

II—The Failure of the District Court to Protect the Procedural Rights of Petitioner and the Sanctioning of That Failure by the Court of Appeals Make This a Compelling Case for the Exercise of This Court's Supervisory Authority 15

a. Petitioner's Section 1981 Claim Should Not Be Barred by Tenn. Code § 28-304 15

b. A Claim Under 42 U.S.C. § 1981 Does Not Require Prior Exhaustion of Administrative Remedies Under the Railway Labor Act 18

c. Petitioner's Title VII Action Should Not Have Been Precluded by His Failure to Refile His Complaint Within 30 Days After Dismissal 19

PAGE

d. Petitioner's Claims Against the Union Locals and Claim Against REA on the Issue of Supervisory Training Are Not Barred by the Doctrine of *Res Judicata* 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 11, 15, 18
American Pipe and Construction Co. v. Utah, —— U.S. ——, 38 L.Ed.2d 713 (1974) 15, 20
Austin v. Reynolds Metal Co., 327 F. Supp. 1145 (E.D. Va. 1971) 21

Balsbaugh v. City of Westland, 458 F.2d 1358 (6th Cir. 1972) 24
Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 11, 13, 16
Brady v. Bristol-Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 19
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972) 19
Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd. per curiam*, 476 F.2d 1287 (5th Cir. 1973) 16
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 14, 20

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972) 19
Culpepper v. Reynolds Metals, 421 F.2d 888 (5th Cir. 1970) 14

PAGE

Denman v. Shubow, 413 F.2d 258 (1st Cir. 1969) 22, 23

Gates v. Georgia Pacific Corp., 7 CCH EPD ¶ 9185 (9th Cir. 1974) 19, 20
Glover v. St. Louis & San Francisco R. Co., 393 U.S. 324 (1969) 18
Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972) 13, 14

Hamman v. United States, 399 F.2d 673 (9th Cir. 1968) 24
Harris v. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir. 1972) 20, 21
Henderson v. First National Bank of Montgomery, 344 F. Supp. 1373 (M.D. Ala. 1972) 13, 15
Holmberg v. Armbrecht, 327 U.S. 392 (1945) 20
Hunter v. Erickson, 393 U.S. 385 (1969) 17
Hutton v. Fisher, 359 F.2d 913 (3rd Cir. 1966) 22

Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973) 13
Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) 16

Klaprott v. United States, 335 U.S. 601 (1949) 22

Love v. Pullman, 404 U.S. 522 (1972) 19

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 11, 13, 14, 17, 19
Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972) 14
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 18
McClendon v. North American Rockwell Corp., 2 CCH EPD ¶ 10,243 (C.D. Cal. 1970) 21

PAGE

McDonnell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962) 22
McKnett v. St. Louis & S.F. R. Co., 292 U.S. 230 (1932) 17
McQueen v. E.M.C. Plastics Co., 302 F. Supp. 881 (E.D. Tex. 1969) 20, 21

Newman v. Piggie Park, 390 U.S. 400 (1968) 19

Patapoff v. Vollstedt's, Inc., 267 F.2d 863 (9th Cir. 1959) 22
Prescod v. Ludwig Industries, 325 F. Supp. 414 (N.D. Ill. 1971) 21
Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941) 24

Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963) 22
Republic Pictures v. Kappler, 327 U.S. 757 (1946), *aff'g* 151 F.2d 543 (8th Cir. 1945) 17
Reynolds v. Daily Press Inc., 5 CCH EPD ¶ 7991 (E.D. Va. 1972) 13
Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. denied* 404 U.S. 1006 (1971) 16
Rooks v. American Brass Co., 263 F.2d 166 (6th Cir. 1959) 22

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) 19
Schiff v. Mead Corp., 3 CCH EPD ¶ 8043 (6th Cir. 1970) 14
Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) 18
Sullivan v. Delaware River Port Authority, 407 F.2d 158 (3rd Cir. 1969) 24

PAGE

Town of Marshall v. Carey, 42 F. Supp. 630 (W.D. Okla. 1941) 24

United States v. Jacobs, 298 F.2d 469 (4th Cir. 1961) 22
U.S. v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973) 16
United States v. Wallace & Tiernan Co., 336 U.S. 793 (1949) 24

Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970) 17, 19
Wells v. Gainesville-Hall County Economic Opportunity Organization, Inc., 5 CCH EPD ¶ 8541 (N.D. Ga. 1973) 14

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 19

Statutes:

Civil Rights Act of 1866,
42 U.S.C. § 1981 ....*passim*

Title VII, Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* ....*passim*

Railway Labor Act,
45 U.S.C. §§ 151 *et seq.* 3, 10, 18, 19

Tennessee Code
§ 28-106 21
§ 28-304 ....5, 10, 12, 15, 16, 17
§ 28-309 16
§ 28-310 ....16, 17

PAGE

Federal Rules of Civil Procedure
Rule 54(b) 24
Rule 60(b) 3, 10, 22

Other Authorities:

1B Moore's Federal Practice ¶ 0.401 (2d Ed. 1965) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on November 27, 1973.

Opinions Below

1. District Court's order in No. C-71-66 dismissing claims under 42 U.S.C. §1981 and granting summary judgment to union locals and partial summary judgment to REA Express on Title VII claims, June 14, 1971, reported at 7 CCH EPD ¶9108 (1a-3a).[1]

[1] This form of citation is to pages of the Appendix.

2. District Court's order in No. C-71-66 dismissing action without prejudice, February 16, 1972, reported at 7 CCH EPD ¶9109 (4a-5a).

3. District Court's opinion and order in No. C-72-183 dismissing refiled complaint, January 25, 1973, reported at 7 CCH EPD ¶9110 (6a-12a).

4. Opinion of Court of Appeals, November 27, 1973, reported at 489 F.2d 525 (13a-21a).

5. Order Denying Rehearing, January 15, 1974, reported at 489 F.2d 525, 530 (22a-26a).

Jurisdiction

The Court of Appeals entered judgment on November 27, 1973. A timely request for rehearing was denied January 15, 1974, and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?

2. Whether a person who claims that he has been discriminated against in employment on account of his race

should be denied a hearing on the merits on any of the following grounds:

a) As to his cause of action under 42 U.S.C. §1981—

i) That Tennessee's one-year statute of limitations on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" bars an employment discrimination suit seeking injunctive relief and back pay;

ii) That failure to exhaust administrative remedies under the Railway Labor Act bars a suit;

b) As to his cause of action under Title VII, a suit dismissed without prejudice for failure to obtain counsel must be refiled within 30 days of the order of dismissal and the order may not be reopened under Rule 60(b), F.R. Civ. P.; and

c) As to his causes of action under either statute, an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect.

Statutory Provisions Involved

1. United States Code, Title 42, Section 1981 (The Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. United States Code, Title 42, Section 2000e-5(e) (Section 706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259) (prior to its amendment by Pub.L. 92-261) reads as follows:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

3. Tennessee Code, Section 28-304, 5 Tennessee Code Annotated 255, provides, in pertinent part:

> *Personal tort actions—Malpractice of Attorneys—Civil rights actions—Statutory penalties,*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after the cause of action accrued. . . .

Statement of the Case

Petitioner, Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment. Petitioner's claims have never received a determination of their merits by a federal court. The procedural vicissitudes of this litigation, therefore, form the basis of this petition.

Petitioner was employed by respondent Railway Express Agency Inc. ("REA") in the spring of 1964 as an express handler in Memphis, Tennessee. Approximately thirty days after his hire date, and pursuant to respondent REA's direction or referral, petitioner became a member of respondent Brotherhood of Railway Clerks Lily of the Valley Local. More than one year after his initial employment petitioner became a truck driver with REA.

On May 31, 1967, petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") charging respondent REA with discriminating against its

black employees with respect to seniority rules and job assignments. He also charged respondent union locals with maintaining racially segregated locals, Brotherhood of Railway Clerks Tri-State Local for whites and Lily of the Valley Local for blacks. On June 20, 1967 respondent REA terminated petitioner's employment, and on September 6, 1967 petitioner amended his EEOC charge to allege that he had been discharged because of his race.

The EEOC issued a report on December 22, 1967 concluding that respondents had engaged in unlawful racially discriminatory employment practices, in that REA directed black employees to membership in Lily of the Valley Local and white employees to membership in Tri-State Local, that membership dues were higher in the black local than in the white local, that REA maintained racially segregated job classifications, that respondent REA's seniority system and job assignments were discriminatory, that REA discriminated against blacks in the imposition of disciplinary action, and that petitioner was discriminatorily discharged. On March 31, 1970 the EEOC issued a decision finding reasonable cause to believe that respondent had violated Title VII of the Civil Rights Act of 1964, and on January 10, 1971 petitioner received from the EEOC a notice of his right to bring suit within 30 days.

Petitioner was unable to obtain private counsel and District Judge Bailey Brown entered an order February 12, 1971 appointing an attorney to represent petitioner and allowing petitioner's notice of right to sue to be filed as a complaint on a pauper's oath.

The court-appointed attorney filed a "Supplemental Complaint" alleging violation of Title VII and 42 U.S.C. §§1981 et seq., and invoking the Court's jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5f. The complaint

filed March 18, 1971 alleged that respondent REA, in conjunction with respondent union locals, engaged in a policy and practice of discriminating against black employees with respect to promotional opportunities and that respondent's job assignment and promotion practices served "to maintain a preexisting pattern of racial discrimination in employment." Petitioner further alleged that he had been denied supervisory training and promotion opportunities which were accorded to white employees, that respondent union locals did not afford black members (including petitioner) the same quality of representation afforded to white members, and that petitioner's discharge was the result of respondent REA's racially discriminatory employment practices. Petitioner prayed for preliminary and permanent injunctive relief, back pay, costs and attorney's fees.

Respondents REA and union locals filed their answers on March 29 and April 6, 1971, respectively. The case was then scheduled for trial on August 18, 1971.

On April 30 and May 11, 1971, the unions and REA, respectively, filed motions to dismiss or in the alternative for summary judgment.

Petitioner's court-appointed attorney filed no memoranda or affidavits on behalf of petitioner in opposition to these motions.

Judge Brown entered an order June 30, 1971 which, *inter alia*, 1) dismissed all claims based on 42 U.S.C. §1981 as barred by Tennessee's one-year statute of limitations for actions "for compensatory or punitive damages, or both, brought under the federal civil rights statutes"; 2) granted summary judgment to the defendant unions; and 3) granted REA partial summary judgment on the issue of improper supervisory training (1a-3a).

Thereafter, the case having been rescheduled for trial on February 2, 1972, respondent REA served petitioner with interrogatories, filed a pre-trial memorandum as required by local rules of court, and took petitioner's deposition. Petitioner's court-appointed counsel took no discovery, by interrogatories, deposition, or otherwise, and filed no pre-trial memorandum.

REA offered Johnson a settlement of one hundred and fifty dollars which Johnson refused. Petitioner's counsel then filed, on January 5, 1972, a motion to be relieved as attorney of record on the grounds that petitioner's case was "questionable," petitioner had not substantiated money damages and had not expressed an intention of advancing the funds necessary for taking depositions, and because petitioner had refused REA's settlement offer. The clerk of the district court advised petitioner by letter dated January 14, 1972 that the motion to withdraw had been granted, and informed plaintiff that if he did "not obtain another counsel to represent [him] within 30 days from this date, [his] claim will be dismissed without prejudice."[2]

Upon receipt of the clerk's letter, petitioner, in an effort to obtain representation, contacted the Memphis EEOC field attorney, the Memphis & Shelby County Legal Services Association, the Shelby County Bar Association Legal Referral Service, and two private attorneys. Finally at the end of the 30 days he returned to the firm of Ratner, Sugarmon & Lucas[3] and explained his plight to William E. Cald-

[2] Petitioner received no notice of a hearing on the motion to withdraw and was afforded no opportunity to state his position. The court made no finding that petitioner was either unable or unwilling to proceed *pro se* or that petitioner was responsible for any delay in bringing the case to trial. No order granting the motion to withdraw was ever entered.

[3] Petitioner had first contacted this firm after receipt of his notice of right to sue. The firm was unable to undertake the representation of petitioner because of his inability to defray litigation expenses and because of the great number of pending Title VII cases to which the District Court has appointed the firm.

well of the firm. On February 17, 1972 Caldwell wrote a letter to Judge Brown indicating that he was attempting to obtain financial support for the litigation and requesting an additional thirty days for petitioner to obtain counsel. However, the preceding day, February 16, Judge Brown had entered an order dismissing petitioner's case "without prejudice" (4a-5a).

On May 5, 1972, Caldwell again wrote to Judge Brown indicating that the NAACP Legal Defense and Educational Fund had agreed to pay litigation costs for petitioner, entering an appearance for petitioner, and requesting that the order of February 16 be vacated and that the case be reinstated on the active docket of the court. Judge Brown replied on May 8, 1972 indicating that the "proper way to handle this matter would be to file a new action since the old one has long been dismissed."

Pursuant to Judge Brown's letter, Caldwell, on May 31, 1972, filed a new complaint on petitioner's behalf (Civil Action No. G-72-183), assigned to District Judge Harry W. Wellford. The new complaint reiterated petitioner's original allegations. Respondent REA and union locals moved for dismissal or for summary judgment on the grounds of untimeliness and *res judicata*. The district court, per Judge Wellford, entered an order of dismissal on the grounds that 1) Judge Brown's interlocutory order of June 14, 1971 granting summary judgment to respondent union locals and partial summary judgment to respondent REA was a "final disposition" constituting *res judicata*, 2) that petitioner's claims under 42 U.S.C. §§1981 et seq. were barred by Tennessee's one-year statute of limitations on "actions for compensatory or punitive damages,

or both, brought under the federal civil rights statutes" [4] and because plaintiff did not pursue his administrative remedies under the Railway Labor Act, and 3) that petitioner had "failed to meet the statutory requirements" of Title VII because he failed to refile his suit within 30 days after Judge Brown's February 16, 1972 order of dismissal without prejudice (6a-12a).

The Court of Appeals affirmed the order of dismissal, disposing of the case on timeliness grounds (13a-21a). First, the Court of Appeals held that the Title VII claims were jurisdictionally barred because "at a minimum [petitioner] had to file the new case within thirty days from the date of dismissal without prejudice." [5] Second, the court held that petitioner's claims under 42 U.S.C. §1981 were time-barred by the running of the statute of limitations. In reaching this conclusion as to the Section 1981 claims the Court of Appeals held: a) that the applicable statute was the one-year limitation contained in Tenn. Code §28-304; and b) that the running of the statute on the Section 1981 claims was not tolled by petitioner's timely filing of charges with the EEOC.[6] The Court of Appeals did not discuss the issues of *res judicata* and exhaustion of remedies under the Railway Labor Act or the failure of the District Court to grant petitioner relief from the dismissal without prejudice pursuant to Rule 60(b).

In its opinion denying rehearing, the Court of Appeals reaffirmed its initial opinion, stating that Tennessee's attempted application of a one-year limitation period to all

[4] Tenn. Code §28-304.

[5] With regard to Judge Brown's February 16, 1972 order of dismissal without prejudice, the Court of Appeals stated:

> "We need not determine the propriety of this order because it was a final order from which no appeal was taken" (15a).

[6] If the statute had been so tolled, petitioner's second complaint, even if regarded as a new action, would have been timely filed.

civil rights actions, regardless of their nature, is not "arbitrary in a constitutional sense" and the statute does not create "an explicit racial classification . . . because citizens of all races are entitled to take advantage of the federal civil rights statutes" (22a-26a).[7]

Reasons for Granting the Writ

1. Assuming for purposes of argument that it was proper to apply to petitioner's claim under 42 U.S.C. §1981 the one-year limitation period provided in Tenn. Code §28-304, even petitioner's second complaint (with respect to his Section 1981 claim) would have been timely had the court below held that the running of the period had been tolled by his filing of a charge with the EEOC.[8] Its holding to the contrary squarely conflicts with decisions of the District of Columbia Circuit and Fifth Circuit Courts of Appeals[9]—indeed, the court below expressly acknowledged its disagreement with the Court of Appeals for the District of Columbia (25a). Moreover, the decision below is incompatible with the flexible approach to overlapping remedies in employment discrimination cases—viz., that pursuit of one does not preclude another—taken by this Court in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 39

[7] In a footnote, the court stated that it agreed with the district court on the *res judicata* question.

[8] Petitioner filed his charge with the EEOC on May 31, 1967, while still employed by REA. The discriminatory acts alleged therein were continuing in nature, so that none of the one-year period had run prior to said filing. The first complaint was filed 25 days after termination of EEOC proceedings, that is, after petitioner received his notice of right to sue; and the second complaint was filed 105 days after the first complaint was dismissed without prejudice. Hence only 130 days of the one-year period had run when the second complaint was filed.

[9] *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.15 (5th Cir. 1971).

L.Ed.2d 147 (1974) (pursuit of remedy under arbitration clause no bar to Title VII action). The holding of the court below would, if allowed to stand, interfere substantially with the successful administration of Title VII. Persons aggrieved by discriminatory employment practices would be discouraged from invoking the assistance of the EEOC and possibly achieving voluntary compliance, inasmuch as they could preserve their claims under Section 1981 only by filing suit, regardless of whether the EEOC had completed its investigation and its attempts at conciliation.

2. The ruling of the court below affirming the dismissal of (a) petitioner's Section 1981 claims on the further grounds of failure to exhaust administrative remedies under the Railway Labor Act and of untimeliness under a state statute, Tenn. Code § 28-304, imposing a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes," (b) petitioner's Title VII claims on the grounds of his failure, when unrepresented by counsel, to refile within thirty days after dismissal without prejudice (petitioner having been given no notice of this requirement),[10] and (c) petitioner's claims, under both statutes, against the unions and, as to failure to train, against REA, on the ground of *res judicata*, so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This court should not allow the great national values expressed in the Civil Rights Acts of 1866 and 1964 to be frustrated by technical rules which, woodenly applied,

[10] In its order denying rehearing, the Court of Appeals makes an observation which suggests that petitioner was directed to refile his complaint within thirty days: "[I]t is difficult to see why claimant should have more than thirty days to refile after dismissal without prejudice, particularly when said refiling is ordered by the Court" (24a). This suggestion that "said refiling [was] ordered by the Court" is wholly without support in the record.

deprive a plaintiff—inadequately represented by court-appointed counsel or wholly unrepresented because of the precipitate withdrawal of said counsel—of the opportunity to have his claims of racial discrimination at the hands of large corporations and powerful unions decided on the merits.

I

The Decision Below With Respect to the Tolling Effect of the Filing of an EEOC Charge Conflicts With Other Court of Appeals Decisions on an Issue Having Serious Implications For the Effectiveness of Title VII and Judicial Administration of Important Federal Statutes.

The Court of Appeals' rejection of the rule that the period of limitation applicable to a Section 1981 action should be tolled for the period during which resolution through the conciliation procedures of the EEOC is attempted (20a-21a, 25a-26a), is in conflict with the decisions of the only other courts of appeals, those for the District of Columbia and the Fifth Circuit, which have considered the question, and with the great majority of district court decisions.[11] The Sixth Circuit's holding also conflicts in principle with those decisions in the Fifth, Sixth and Ninth Circuits and various district courts holding that the period of limitations for the commencement of proceedings under Title VII should be tolled for the period during which the

[11] *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, *supra*, 437 F.2d at 1017 n.16 (5th Cir. 1971); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972); *Reynolds* v. *Daily Press Inc.*, 5 CCH EPD ¶7991 (E.D. Va. 1972). Contra: *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D. Del. 1973).

resolution through arbitration or through the National Labor Relations Board is attempted.[12]

The rationale of the decisions holding that the Section 1981 period of limitation should be tolled by the filing of a charge is that Title VII indicates "a recent Congressional decision to favor informal methods of settlement and conciliation short of litigation in employment cases" and that "[p]laintiffs, who often proceed initially without assistance of counsel and bring their complaint first to EEOC in accord with this legislative policy, should not be penalized for this action when they later sue for relief in District Court under both Title VII and § 1981, which overlaps Title VII." *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 994-95 n.30. Under the contrary rule adopted by the Sixth Circuit, in order for petitioner to have preserved both his Title VII and his Section 1981 claims, he would have to have both filed a charge with EEOC, and, within one year after his discharge (21 months before EEOC made its finding of reasonable cause and two and one-half years before it issued the right-to-sue letter), filed a lawsuit under Section 1981. Such a requirement, by discouraging or rendering futile (by the prior determination of the Section 1981 action) recourse to the Congressionally favored policy of conciliation, would vitiate the administrative procedures of the EEOC and be adverse to the interests of judicial economy.

The view that the Section 1981 limitation period should be tolled during the pendency of proceedings before the EEOC comports with the position adopted by this Court in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965)

[12] *Culpepper* v. *Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970); *Schiff* v. *Mead Corp.*, 3 CCH EPD ¶8043 (6th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Wells* v. *Gainesville-Hall County Economic Opportunity Organization, Inc.*, 5 CCH EPD ¶8541 (N.D. Ga. 1973); *Guerra* v. *Manchester Terminal Corp.*, *supra*.

and reaffirmed in *American Pipe and Construction Co.*, v. *Utah*, —— U.S. ——, 38 L.Ed.2d 713 (1974), that where the policies of ensuring essential fairness to defendants and of barring a plaintiff "who has slept on his rights" are satisfied, a statute of limitations should be tolled during the pendency of a related action the outcome of which could provide the relief plaintiff seeks. The filing of a charge with the EEOC puts the respondent on notice of the charging party's substantive claims. There is neither surprise nor the dredging up of a stale claim, and duplicate adjudication is avoided. See *Henderson* v. *First National Bank of Montgomery*, *supra*, 344 F. Supp. at 1377.

Finally, it is a necessary corollary to this Court's recent holding in *Alexander* v. *Gardner-Denver*, *supra*, that attempts to seek resolution by means other than litigation should be encouraged not only by rejection of the doctrine of election of remedies, but also by adoption of the rule that such attempts toll the applicable statutes of limitations for commencement of litigation.

II

The Failure of the District Court to Protect the Procedural Rights of Petitioner and the Sanctioning of That Failure by the Court of Appeals Make This a Compelling Case For the Exercise of This Court's Supervisory Authority.

a. Petitioner's Section 1981 Claim Should Not Be Barred by Tenn. Code § 28-304.

Even if the period of limitation on petitioner's Section 1981 claim were not deemed tolled by the filing of his E.E.O.C. charge, the first action and the refiled action should have been held timely under Tennessee's six-year

statute of limitations for actions on contracts[13] or its ten-year statute for actions not otherwise provided for.[14]

In both his supplemental complaint filed in No. C-71-66 and his complaint filed in No. C-72-183, petitioner sought injunctive relief from respondent's discriminatory employment practices and an award of back pay and counsel fees. In both actions petitioner's claims under Section 1981 were dismissed by the application of that portion of Tenn. Code § 28-304 which provides a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" (2a, 10a). The Court of Appeals affirmed, ignoring the point that this action was not one for compensatory or punitive damages, but an action in equity for injunctive relief and back pay.[15] While Tenn. Code § 28-304 may be applicable to other types of civil rights actions, it is clearly inapplicable by its very terms to the case at bar. The Tennessee limitation provision that would seem to apply is either its statute for actions on contracts,[16] given that Section 1981

[13] Tenn. Code §28-309.

[14] Tenn. Code §28-310.

[15] Courts of Appeals which have considered the question have rejected the contention that back pay is "damages":

> "The demand for back pay [in a Title VII action] is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not the jury."

Johnson v. *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969). Accord: *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), cert. denied 404 U.S. 1006 (1971); see also, *U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354, 380 (8th Cir. 1973).

[16] Tenn. Code §28-309 (six years). See *Boudreaux* v. *Baton Rouge Marine Contracting Co., supra*, 437 F.2d at 1017 n.16 (5th Cir. 1971). But see *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd per curiam*, 476 F.2d 1287 (5th Cir. 1973), in which the court applied a statute of limitations for actions for "injury to the person or rights of another, not arising from contract," but noted that "one may indeed ask whether, after all, the more appropriate standard should be the doctrine of laches." 339 F. Supp. at 1117 n.9.

protects the right "to make and enforce contracts," or its residuary statute for civil actions not otherwise provided for.[17] Under either of these, petitioner's Section 1981 claim was timely filed.

Indeed if, contrary to its plain language, Tenn. Code § 28-304 were applicable, it would be violative of both the supremacy clause of Article VI of the Constitution, in that it discriminates against rights arising under federal laws,[18] and the equal protection clause of the Fourteenth Amendment, in that it creates an (ineptly camouflaged) explicit racial classification, drawing a distinction between those who seek the law's protection against racial discrimination in employment and those who seek to vindicate their employment rights on other grounds.[19]

[17] Tenn. Code §28-310 (ten years). See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Macklin* v. *Spector Freight Systems, Inc., supra*. In *Macklin* the court noted that it did not have to decide whether the contract statute of limitations might be more closely analogous, since the limitation period would have been the same. 478 F.2d at 994-95 n.30.

[18] *Republic Pictures* v. *Kappler*, 327 U.S. 757 (1946), *aff'g* 151 F.2d 543 (8th Cir. 1945); *McKnett* v. *St. Louis & S.F. R.Co.*, 292 U.S. 230 (1934).

[19] *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

b. A Claim Under 42 U.S.C. § 1981 Does Not Require Prior Exhaustion of Administrative Remedies Under the Railway Labor Act.[20]

The ruling of the District Court that petitioner's cause of action under Section 1981 was barred by his failure to pursue his administrative remedy under the Railway Labor Act (10a) is contrary to this Court's holding in *Glover* v. *St. Louis & San Francisco R. Co.*, 393 U.S. 324 (1969). In *Glover*, plaintiffs sued the railroad and the union, claiming that they had been discriminated against on account of their race. Rejecting the contention that the complaint should have been dismissed for failure by plaintiffs to exhaust their remedies under the Railway Labor Act, this Court pointed out that "insistence that plaintiffs exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U.S. at 331. See also, *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Alexander* v. *Gardner-Denver Co., supra*, 39 L.Ed. 2d at 164, n. 19.

Furthermore, it has been recognized by the Courts of Appeals for the Third, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits that Section 1981 creates an independent right of action not requiring exhaustion

[20] The Court of Appeals found it unnecessary to rule upon this question. However, since the District Court's holding that petitioner's Section 1981 action should be dismissed for failure to exhaust his Railway Labor Act remedies would keep petitioner out of court even if he should prevail on the tolling issue, we ask the Court to rule on this question in furtherance of sound judicial administration. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

of administrative remedies under other federal statutes.[21] Clearly, the District Court was in error in ruling that petitioner was barred from suing on his Section 1981 claim for failure to exhaust administrative remedies under the Railway Labor Act.

c. Petitioner's Title VII Action Should Not Have Been Precluded by His Failure to Refile His Complaint Within 30 Days After Dismissal.

After it permitted petitioner's court-appointed attorney to withdraw, the District Court dismissed petitioner's complaint in C-71-66 *sua sponte*, without a hearing. Its order of dismissal contained no notice that petitioner must refile his complaint within thirty days. The subsequent dismissal by the District Court in No. 72-183 of petitioner's Title VII complaint is in conflict with the principles enunciated by this Court with respect to liberal construction of the procedural requirements of Title VII[22] and to the Congressional policy against discrimination.[23]

With respect to the initial filing of a complaint under Title VII, "certain equitable principles may operate to toll the 30 day requirement." *Gates* v. *Georgia Pacific*

[21] *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra; Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc., supra.*

[22] *Love* v. *Pullman*, 404 U.S. 522 (1972).

[23] *Newman* v. *Piggie Park*, 390 U.S. 400 (1968).

Corp., 7 CCH EPD ¶9185 (9th Cir. 1974).[24] This Court has recently affirmed this principle, stating that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Construction Co.* v. *Utah, supra,* 38 L.Ed. 2d at 730.[25] Where, as in the case at bar, the plaintiff has not had a clear notice of the time limitation on his right to sue and has acted with all of the diligence and promptness which could be expected, it has been held that the limitation period does not start running until the plaintiff receives explicit notice.[26] That rule should apply here: petitioner's time for refiling his complaint should not have started until the District Court, knowing that he was unrepresented by counsel, notified him that he had thirty days within which to refile.[27]

Similarly, courts have been liberal in their interpretation of what constitutes the commencement of a Title VII action, holding that a motion for appointment of counsel tolls the running of the thirty-day period.[28]

The rationale of these cases applies with special vigor to the instant case. Here petitioner diligently sought to prosecute his action and obtain counsel. He had no notice of his duty to reinstitute suit within 30 days. More importantly, petitioner would never have run afoul of any rule requiring him for a second time to meet the thirty-day filing requirement but for the District Court's *sua sponte* dismissal of his complaint with full knowledge that petitioner had at the outset relied on the court to appoint counsel. The equities here require treating Caldwell's February 17, 1972 letter requesting an additional thirty days for petitioner to obtain counsel as the equivalent of a motion for the appointment of counsel, satisfying the revived thirty-day requirement.

After diligently pursuing his case from May 31, 1967, when he filed his charge with the EEOC, to January 24,

---

[24] Accord: *Harris* v. *Walgreen's Distribution Center*, 456 F.2d 588 (6th Cir. 1972); *McQueen* v. *E.M.C. Plastics Co.*, 302 F.Supp. 881 (E.D. Tex. 1969).

[25] See also *Burnett* v. *New York Central R. Co., supra; Holmberg* v. *Armbrecht*, 327 U.S. 392 (1945).

[26] *Gates* v. *Georgia Pacific Corp., supra,* 7 CCH EPD ¶9185 at 6944. Indeed, the Sixth Circuit reversed a lower court's failure to accept a renewed motion for the appointment of counsel made after the first motion had been denied and more than thirty days after the receipt of the notice of right to sue, stating:

> [P]ursuant to the Congressional purpose when after decision on the motion for counsel the time remaining is unreasonably short for securing a lawyer and filing the complaint, the District Judge's order granting or denying the motion for appointment of Counsel should set a reasonable time.

Harris v. *Walgreen's Distribution Center, supra,* 456 F.2d at 592. The only order made by the District Court in C-71-66 relating to dismissal of the action was that entered ~~March~~ February 16, 1972 (4a-5a). That order set no time for the refiling of petitioner's complaint.

[27] Respondents could not be said to be disadvantaged by this rule, since this was a case of first impression in the Sixth Circuit and the Tennessee savings statute, Tenn. Code §28-106 provides a one-year period for commencement of a new action when a "judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action." The only case holding that a Title VII case must be recommenced within 30 days after dismissal without prejudice was *McClendon* v. *North American Rockwell Corp.*, 2 CCH EPD ¶10,243 (C.D. Cal. 1970), where there was no such savings statute.

[28] *Harris* v. *Walgreen's Distribution Center, supra; McQueen* v. *E.M.C. Plastics Co., supra; Prescod* v. *Ludwig Industries*, 325 F. Supp. 414 (N.D. Ill. 1971); *Austin* v. *Reynolds Metal Co.*, 327 F.Supp. 1145 (E.D. Va. 1971).

1973, the date of dismissal of his second complaint, petitioner found himself, in the words of the District Court, in the "regrettable" position of having his complaint "dismissed without a hearing on the merits by reason of the circumstances alluded to" (12a). The court below never discussed one of the questions assigned as error, namely that the District Court abused its discretion by failing to reopen the first action, C-71-66, pursuant to its powers under Rule 60(b), F.R. Civ.P. It could have done so either by treating Caldwell's letters of February 17 or May 5, 1972 or the refiled complaint as a motion, or by acting on its own motion.[29]

This court has established the principle that Rule 60(b) is to be liberally construed and that any doubt is to be resolved in favor of an application to set aside a default judgment or a dismissal for lack of prosecution in order that a case may be tried on the merits. *Klaprott* v. *United States*, 335 U.S. 601 (1949). Numerous courts of appeals have reversed the denial of relief under Rule 60(b)(1) and (6) as an abuse of judicial discretion.[30]

In *Denman* v. *Shubow, supra*, a case strikingly close on its facts to the case at bar, plaintiff, appearing *pro se* in a civil rights action, overslept because he had taken some prescribed medication and missed a calendar call, whereupon his case was dismissed without prejudice for lack of prosecution. In the afternoon of the same day, after calling the clerk to explain his absence and learning of the dismissal, he filed a handwritten motion for reconsideration,

[29] *McDonnell* v. *Celebrezze*, 310 F.2d 43 (5th Cir. 1962); *United States* v. *Jacobs*, 298 F.2d 469 (4th Cir. 1961).

[30] *Denman* v. *Shubow*, 413 F.2d 258 (1st Cir. 1969); *Hutton* v. *Fisher*, 359 F.2d 913, 916 (3rd Cir. 1966); *Radack* v. *Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2nd Cir. 1963); *Rooks* v. *American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Patapoff* v. *Vollstedt's, Inc.*, 267 F.2d 863 (9th Cir. 1959).

which the district court denied. The Court of Appeals for the First Circuit reversed, stating:

> "When the circumstances surrounding plaintiff's tardiness were brought to the district court's attention by the motion for reconsideration, we think the ends of justice would have been better served if the district court had taken the necessary steps to assign the case for trial on the merits. This *pro se* plaintiff would thereby have been assured of his day in Court." (413 F.2d at 259.)

Similarly, in the instant case the District Court should have assured petitioner of a trial on the merits by reopening C-71-66 after Caldwell explained petitioner's plight and asked for a thirty-day extension of the time to obtain counsel or after he entered his appearance and asked that the order of dismissal be vacated.

d. Petitioner's Claims Against the Union Locals and Claim Against REA on the Issue of Supervisory Training Are Not Barred by the Doctrine of *Res Judicata*.

In its order of June 14, 1971, the District Court granted summary judgment to respondent union locals and partial summary judgment to respondent REA (2a). Upon the filing of petitioner's second complaint, following dismissal of the first without prejudice, respondents moved to dismiss on the ground, *inter alia*, that the interlocutory summary judgment order constituted *res judicata*. Accepting this contention, the District Court dismissed all of petitioner's claims against the union locals (9a) and his claim against REA on the issue of supervisory training (10a).

On appeal, the Court of Appeals did not discuss this issue, but in its opinion denying rehearing the Court of

Appeals, in a footnote, affirmed the District Court's conclusion (23a).

These rulings are erroneous and should be reversed. It is hornbook law that *res judicata* effect can be given only to final decisions on the merits. See 1B Moore's Federal Practice ¶ 0.401 (2d Ed. 1965). The District Court's summary judgment order dismissing fewer than all of the defendants was neither final nor appealable, Rule 54(b), F.R. Civ. P., as the Sixth Circuit itself has recognized. *Balsbaugh* v. *City of Westland*, 458 F.2d 1358 (6th Cir. 1972). Accord: *Sullivan* v. *Delaware River Port Authority*, 407 F.2d 58 (3rd Cir. 1969); *Hamman* v. *United States*, 399 F.2d 673 (9th Cir. 1968). It could not be given *res judicata* effect, unless by a subsequent order of the court. The only subsequent order, however, was Judge Brown's order of February 16, 1972 dismissing the complaint without prejudice (4a-5a). Since dismissal without prejudice is not an adjudication on the merits, such an order cannot have *res judicata* effect.[31] *Public Service Commission* v. *Brashear* Freight Lines, 312 U.S. 621 (1941). Even if it were thought, as respondents have argued below, that the interlocutory order merged into the subsequent order of dismissal without prejudice, it does not thereby acquire *res judicata* finality.[32] Petitioner, whose first complaint was dismissed solely because he did not have a lawyer, could hardly have been required to appeal a non-prejudicial order on the theory that an earlier order, unappealable at the time of its entry, had acquired a quality of finality which even the later order lacked.

---

[31] As the court below noted in another context, "[A]n action dismissed without prejudice leaves the situation the same as if the suit had never been brought" (17a).

[32] *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949); *Town of Marshall* v. *Carey*, 42 F. Supp. 630, 635 (W.D. Okla. 1941).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

APPENDIX

District Court's Order Dismissing Claims Under 42 U.S.C. §1981 and Granting Summary Judgment to Union Locals and Partial Summary Judgment to REA Express on Title VII Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-71-2

THOMAS THORNTON,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants,

—and—

CIVIL C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER WITH RESPECT TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Upon consideration, and after argument of counsel, it is hereby ORDERED:

1. Insofar as plaintiffs in both cases sue under Civil Rights statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing these claims, that therefore the Tennessee statute of limitations of one year would apply, and both of these claims were barred by such statute at the time they were filed.

2. The motions to dismiss in both cases on the ground that the thirty-day letter filed within the thirty-day period is not sufficient to satisfy the requirement that a complaint be filed within thirty days following the issuance of said letter are overruled. See opinion of Judge Harry W. Wellford, *Joeanna Beckum* v. *Tennessee Hotel*, (W.D. Tenn. 1971) attached hereto. Cf. *Rice* v. *Chrysler Corp.*, —— F. Supp. ——, 3 FEP Cases 436 (E.D. Mich. 1971).

3. The motion of the defendant Union locals for summary judgment will be granted on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964.

4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiffs supervisory training are granted on the ground that from the undisputed facts plaintiffs have not shown any discrimination in this respect.

5. The motions of REA Express, Inc. for summary judgment with respect to the claim of both plaintiffs of discriminatory discharge and with respect to plaintiff

Johnson's claim of denial of equal promotional opportunities and discrimination in job assignment be and the same are hereby denied.

ENTER this 14th day of June, 1971.

/s/ BAILEY BROWN
Chief Judge

A True Copy
W. LLOYD JOHNSON, *Clerk*

By: A. A. BREAUX
Deputy Clerk

FILED
JUN 14 1971

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Order Dismissing Action Without Prejudice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL NO. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC., *et al.,*

Defendants.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

In this cause, this Court heretofore appointed Robert Rose of the Memphis Bar to represent this plaintiff, as well as the plaintiff Thomas Thornton in C-71-2, which are EEOC claims by these plaintiffs against REA Express and others. Thereafter, after various proceedings in these matters, counsel for the plaintiffs appeared in court and stated that he had managed to obtain an offer of settlement from REA Express, that plaintiff Thornton had agreed to accept the settlement, but plaintiff Johnson was unwilling to do so. Counsel further stated to the Court that in all frankness, in view of the staleness of the claim and other reasons, he had strongly recommended these settlements, but had been unable to persuade plaintiff Johnson to accept. The cases were set for trial on February 2,

1972, and Mr. Rose filed a motion on or about January 7, 1972 to be relieved as attorney for plaintiff Johnson, which the Court granted on January 14, 1972. On the latter date, the Clerk of this Court, under direction of the Court, wrote to plaintiff Johnson stating that Mr. Rose had been relieved, that the setting for trial on February 2, 1972 would have to be reset, and that plaintiff Johnson was allowed 30 days from that date to obtain other counsel or his case would be dismissed without prejudice. Since such 30 days have passed without plaintiff having obtained such counsel and so notifying the Clerk as he was directed, this cause should be dismissed without prejudice.

It is therefore ORDERED and ADJUDGED that this action be and the same is hereby dismissed without prejudice.

ENTER this 15th day of February, 1972.

/s/ BAILEY BROWN
Chief Judge

A True Copy.
Attest:
W. LLOYD JOHNSON
(Illegible)

FILED
FEB 16 1972

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Opinion and Order Dismissing Refiled Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-72-183

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER ON DEFENDANT MOTIONS FOR JUDGMENT

This is an action brought by a former employee of Railway Express Agency, Inc. (REA) against that carrier and two local lodges of the BRAC, i.e., the Tri-State Local and the Lily of the Valley Local (BRAC Locals) alleging violations of the civil rights of the plaintiff under federal statute. Jurisdiction is asserted pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Sec. 2000e, et seq.), the provisions of other federal statutes protecting civil rights set forth in 42 U.S.C.A., Sections 1981, 1982 and 1988, and the provisions of Title 28 of the United States Code, Section 1343. The complaint asks for injunctive relief, compensatory damages, and the award of costs of the action together with reasonable attorneys' fees.

District Court's Opinion and Order Dismissing Refiled Complaint

Paragraph VIII of the present complaint states that "this is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested herein." Said paragraph VIII then goes on to recite the following facts with respect to the prior complaint:

> "On February 12, 1971, this Court entered orders appointing Robert E. Rose as attorney for plaintiff and allowing plaintiff's 'Notice of Right to Sue' letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a 'Supplemental Complaint' was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendants Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever filed on behalf of plaintiff in opposition to defendants' motions.
>
> On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other than Title

> VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA 'with respect to the claim of dismissal for not giving plaintiffs supervisory training'; (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the 'Notice of Right to Sue' letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants)."

The complaint, with respect to prior history of this dispute, also sets out in substance that plaintiff's appointed counsel, Mr. Rose, failed to take discovery and to prepare the case for trial, and being dissatisfied with plaintiff's cause of action and his refusal to settle, was permitted by Judge Brown to withdraw as counsel (purportedly without notice to plaintiff) within a few weeks before the date fixed for trial. Plaintiff further asserts and the record bears out in the prior action that Judge Brown directed the Court Clerk to notify plaintiff that if he did not obtain another counsel within 30 days his claim would be dismissed without prejudice.

Plaintiff's present counsel after being contacted (for the second time) by plaintiff within the prescribed 30 day period wrote to Judge Brown within a day or two *after* this period had elapsed, requesting an additional 30 days for plaintiff to secure legal representation. The Court had,

however, on the 30th day (February 16, 1972) entered an order dismissing the case *without* prejudice. This action has been subsequently filed on May 31, 1972.

At no time did plaintiff Johnson appeal to the United States Court of Appeals for the Sixth Circuit the order of Judge Brown dated June 14, 1971, granting the BRAC Locals summary judgment with respect to the claims upon Title VII of the Civil Rights Act of 1964 and dismissing plaintiff Johnson's claims based upon other federal statutes.

Plaintiff's Claim Against Defendant Unions

This action clearly involves the same parties and the same subject matter of dispute as were before Judge Brown.[1] Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim again after a final disposition by Judge Brown. *Sopp* v. *Gehrlin*, 236 F. Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree*, 326 F. Supp. 755 (E.D. Pa. 1971), *Vassos* v. *Societa Trans-Oceania*, 272 F.2d 182 (2nd Cir. 1960), *cert. denied*, *Haldane* v. *Wilhelmina Helen King Chagnon*, 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a "second bite at the apple" after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction. Of course, if Judge Brown had no such jurisdiction of thet parties, neither do we. The motion of defendant unions, either for dismissal, or for summary judgment, is granted on grounds of res adjudicata. Other grounds are discussed hereinafter.

---

[1] The complaints in both causes are substantially similar.

District Court's Opinion and Order
Dismissing Refiled Complaint

Plaintiff's Claim Against REA

1. Plaintiff's claims of violation of his civil rights under 42 U.S.C. 1981 through 1988 were properly dismissed and are here dismissed because barred by the applicable Tennessee one year statute of limitations. *Ellenburg* v. *Shepherd*, 406 F.2d 1331 (6th Cir. 1968) and *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968). In addition, plaintiff's cause of action under these sections would be subordinate to provisions of the Railway Labor Act which governs the defendant employer (and the defendant unions). See also *Oliphant* v. *Brotherhood Firemen, et al.*, 262 F.2d 359 (6th Cir. 1958) *cert. denied*, 359 U.S. 935. No effort was made by plaintiff to protect or assert his rights under the administrative procedures available under that Act. As to all claims of plaintiff other than those asserted under Title VII of the 1964 Civil Rights Act, then, the cause of action is barred under the statute of limitations defense asserted by all defendants and because plaintiff did not pursue his administrative remedy under the Railway Labor Act.

2. Judge Brown's previous order of June 14, 1971, granted defendant REA's motion for summary judgment after a hearing with respect to plaintiff's claim regarding lack of supervisory training "on the ground that from the undisputed facts plaintiff[s] have not shown any discrimination in this respect—" Judge Brown considered the affidavits and evidence before him and dismissed plaintiff's claim in this particular. We hold that Judge Brown's ruling was a final disposition and constitute res adjudicata as to this aspect of plaintiff's claim.

3. It is also asserted that plaintiff has failed to comply with jurisdictional requirements of the Equal Employment

District Court's Opinion and Order
Dismissing Refiled Complaint

sections of the Civil Rights Act. Judge Brown ruled that under the then circumstances of the case the "30 day provision" of the act did not bar plaintiff's claim because he relied in part upon the Court for advice as to how to file his claim of unlawful racial discrimination and simply filed his notice or letter from Equal Employment Opportunity Commission giving him the right to sue within the requisite 30 day period. This Court in *Beckum* v. *Tennessee Hotel*, Cause C-70-417, ruled similarly on the same issue on May 6, 1971. In *Beckum, supra*, however, we did not rule as to whether this procedure met minimal requirement of F.R.Civ. P. 8a(2). Further complications ensued in this case after Judge Brown's initial ruling on the 30 day statutory requirement and plaintiff's suit was dismissed without prejudice,[2] February 16, 1972. Plaintiff's counsel wrote Judge Brown again on May 3, 1972,[3] requesting reinstatement of the cause explaining the financial inability of plaintiff, and also seeking vacation of the Court's previous order. This Judge Brown declined to do since the case "has long since been dismissed".[4]

Considering all the circumstances of the matter, we find reluctantly that plaintiff has failed to meet statutory requirements and that his refiling should have taken place within 30 days after Judge Brown's February 16, 1972 order. The Chief Judge extended unusual consideration to plaintiff that would not have been granted ordinary civil litigants and we cannot hold under the circumstances that Title VII Civil Rights Act requirements imposed by Con-

[2] It is noted, however, that notice had been issued to plaintiff that his case would be dismissed if he did not obtain a lawyer by the appointed time.

[3] See Exhibit to complaint.

[4] See Exhibit to complaint.

District Court's Opinion and Order Dismissing Refiled Complaint

gress may be indefinitely extended by the Courts. Defendant REA's motion to dismiss will therefore be granted. *See Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970), *Brady* v. *Bristol-Myers, Inc.*, 332 F. Supp. 995 (E.D. Mo. 1971).

It should also be observed that the Equal Employment Opportunity Commission in this case was perhaps partially at fault in the handling of plaintiff's complaint because of the long 4 year delay involved in processing the complaint before issuance of the right to sue notice. It is regrettable that plaintiff's complaint should be dismissed without a hearing on its merits by reason of the circumstances alluded to in this order.

We, nevertheless, grant all defendants' motions and dismiss the complaint filed herein for the reasons stated, but at the cost, under the circumstances, of REA.

HARRY W. WELLFORD
United States District Judge

Date: 1/24/73

A True Copy.

Attest:

W. LLOYD JOHNSON, *Clerk*
By A. A. BREAUX D.C.

FILED
JAN 25 1973

Clerk, U.S. Dist. Court
Western Dist. of Tenn.

Opinion of Court of Appeals

No. 73-1306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Decided and Filed November 27, 1973.

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court dismissing plaintiff's complaint which alleged employment discrimination.

Plaintiff-appellant, Willie Johnson, filed timely charges with Equal Employment Opportunity Commission (EEOC) in 1967 in which he alleged that his employer, Railway Express Agency, Inc. (REA), discriminated against him with

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

regard to seniority rules and job assignments. Johnson further asserted that he had been discharged by REA because of his race (black). Johnson also charged the Brotherhood of Railway Clerks Tri-State Local and the Lily of the Valley Local with maintaining segregated Locals.

On December 22, 1967 EEOC filed a report concluding that the company and the unions had engaged in discriminatory practices; however, it was not until January 15, 1971 that Johnson received his notice of right to sue letter from EEOC. Initially Johnson was unable to retain a lawyer to file suit authorized by the letter. On February 12, 1971 District Judge Bailey Brown allowed Johnson to file the EEOC notice-letter with the Clerk as satisfying the duty to institute suit within thirty days from date of receiving notice. Judge Brown further allowed Johnson to proceed *in forma pauperis* and appointed an attorney to represent him. The court-appointed attorney filed an amended complaint on March 18, 1971, setting forth in more detail Johnson's claims.

At this point both defendants moved for summary judgment supported by affidavits. The unions also propounded to plaintiff interrogatories, which he answered. Plaintiff submitted no affidavits in opposition to these motions.

On June 14, 1971 the Court entered an order which—

(1) dismissed all claims based on statutes other than Title VII of the 1964 Civil Rights Act as barred by Tennessee's one-year statute of limitations,

(2) denied the defendants' claims that the filing of the EEOC notice-letter was insufficient to meet the thirty-day filing requirement,

(3) granted the two unions' motions for summary judgment, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act,

(4) granted the motion of REA for summary judgment regarding improper supervisory training, and

(5) denied REA's motion for summary judgment regarding Johnson's claims of discriminatory discharge, denial of promotional opportunities, and discrimination in job assignment.

After this ruling, REA offered Johnson one hundred fifty dollars in settlement of the case; Johnson refused. Subsequently the case was assigned for trial and Johnson's court-appointed attorney, with the Court's permission, withdrew from the case on January 14, 1972. On that date the Clerk of the District Court, acting pursuant to the Court's direction, wrote a letter to Johnson giving him thirty days in which to obtain a new attorney or have his case dismissed without prejudice. Johnson did not obtain a new attorney within such time, and on February 16, 1972 Judge Brown entered an order dismissing the action without prejudice. We need not determine the propriety of this order because it was a final order from which no appeal was taken.

On February 17, 1972 William Caldwell, now one of Johnson's lawyers, wrote to Judge Brown informing him that he, Caldwell, was looking for financial support which would enable him to take Johnson's case. The letter was clearly not an announcement that Caldwell was his counsel; the letter stated only that he might be Johnson's counsel at some point in the future. Later Caldwell found such financial support and did undertake to represent Johnson. On May 31, 1972 a second complaint was filed against REA and the unions, with Caldwell acting as counsel for Johnson.

All of the defendants moved for dismissal or, in the alternative, for summary judgment. The case was assigned

to District Judge Wellford, who ruled on these motions on January 25, 1973. First, the Court dismissed Johnson's claims against the unions on grounds of *res judicata*, holding that the present suit involved the same parties and the same subject matter decided in the first action where summary judgment was granted by Judge Brown. Second, the Court held that Johnson's claims of violation of his civil rights under 42 U.S.C. §§ 1981 through 1988, were barred by Tennessee's one-year statute of limitations. Third, the Court found that Johnson did not pursue properly his administrative remedies under the Railway Labor Act. Fourth, the Court held that *res judicata* barred Johnson's claims against REA on the issue of supervisory training. Fifth, the Court ruled that Johnson's failure to refile a lawsuit within thirty days from February 16, 1972 (the date of dismissal without prejudice) resulted in a failure to comply with the thirty-day filing requirement.

We will deal first with the thirty-day filing requirement since failure to meet it results in a lack of jurisdiction. *Goodman* v. *City Prods. Corp.*, 425 F.2d 702 (6th Cir. 1970).

Johnson contends that he was not required to file suit within thirty days after dismissal without prejudice. He argues that the only statutory requirement is that he file his original suit within thirty days after receipt of his notice-letter. We disagree. We rely on our decision in *Bomer* v. *Ribicoff*, 304 F.2d 427 (6th Cir. 1962), and the decision in *McClendon* v. *North American Rockwell Corp.*, 2 CCH Employment Prac. Dec., Par. 10,243 (C.D. Cal. 1970).

In *Bomer*, plaintiff's request for increased benefits under the Social Security Act was denied on August 4, 1959. He was advised that he could file a civil action within sixty days, challenging this determination, since there was a

statutory procedure for such challenge within that time span. He filed such suit on September 30, 1959. On May 5, 1960, on his motion his case was dismissed without prejudice. Plaintiff later refiled his action on May 1, 1961. The Government moved to dismiss, contending that the plaintiff failed to commence suit within sixty days after notice of the final decision on August 4, 1959. The District Judge granted the Government's motion and dismissed the case. In affirming, Judge Shackelford Miller wrote for a unanimous court:

> An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. A. B. Dick Co. v. Marr, 197 F.2d 498, 502, C.A. 2nd; cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; Bryan v. Smith, 174 F.2d 212, 214, C.A. 7th. In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. Humphreys v. United States, 272 F.2d 411, 412, C.A. 9th; Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; DiSabatino v. Mertz, 82 F. Supp. 248, 249-250, M.D.Pa.
>
> The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. Zeller v. Folsom, 150 F. Supp. 615, 617, N.D.N.Y.; Coy v. Folsom, 228 F.2d 276, 279-280, C.A. 3rd; Ewing v. Risher, 176 F.2d 641, C.A. 10th; Scott v.

Railroad Retirement Board, 227 F.2d 684, 686, C.A. 7th. (304 F.2d at 428, 429)

Additionally, in *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968), we held that filing of previous actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401 (b).

McClendon, supra, is the case factually closest to the one at bar. There, plaintiff received a right to sue letter on January 15, 1968, and filed an action on January 19, 1968 which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. Defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

In *McClendon* the District Court noted that the effect of voluntary dismissals without prejudice, absent a savings statute, was to create a situation the same as though the suit had never been brought. The Court stated:

> Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective. 2 CCH E. P. Dec. at 974.

Although *Bomer* and *McClendon* are authority for the proposition that the filing of a suit which was dismissed

without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued. Here, the claim was already stale before the initial suit was filed. 42 U.S.C. § 2000e-5(e) was meant to eliminate such possibilities.

Any error that was committed was an error in favor of appellant Johnson. He failed to comply even with the District Court's liberal interpretation of the requirement by his failure to file within thirty days after dismissal. The Title VII claims are thus barred since the Court was without jurisdiction to hear the charges set forth in the new complaint filed on May 31, 1972.

The second question for consideration is whether Johnson's claims under 42 U.S.C. §§ 1981, 1982 and 1983, were time-barred by a Tennessee statute of limitations. Both Judge Brown's first ruling and Judge Wellford's later order found that these claims were time-barred. We agree. It is the duty of Federal Courts to apply the state statute of limitations most analogous to these actions. Appellant agrees

with this but differs only as to what is the most analogous statute.

We feel that the most analogous statute is Title 28, Section 304, of the Tennessee Code. It reads as follows:

> *Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Appellant contends that while this state statute, Section 304, is appropriate for Sections 1983 and 1985 actions, it is not appropriate for § 1981 actions. However, *Snyder* v. *Swann*, 313 F. Supp. 1267 (E.D. Tenn. 1970), held this precise statute applicable to a Section 1981 action.

Appellant further contends that his complaint sounds in contract and is governed by a six-year statute of limitations. In our opinion, the complaint sounds in tort rather than in contract. Moreover, the very language of the state statute refers to "civil actions . . . brought under the federal civil rights statutes." Thus, the tort-contract dichotomy does not have to be resorted to, given the preciseness of the state statute.

Finally on this point, appellant argues that filing of the charges with the EEOC tolls the statute of limitations under 42 U.S.C. § 1981. We reject this claim. In *Williams* v. *Hollins*, 428 F.2d 1221 (6th Cir. 1970), we declined to toll

the statute in a section 1983 action during the time when plaintiff was in a Tennessee jail, since Section 301 of Title 28 of the Tennessee Code did not contain any such savings clause. In addition, appellant concedes the Title VII and Section 1981 claims are independent. Thus, no reason exists for stopping the running of a state statute of limitations while a charge is pending before the EEOC.

We have considered other points assigned as error, but in view of our disposition of the case they do not require discussion.

The judgment of the District Court is affirmed.

Order Denying Rehearing

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

ORDER ON PETITION FOR REHEARING

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

This cause came on to be heard on the petition for rehearing, with a suggestion that it be heard en banc; and no Judge having requested that a vote be taken on whether said petition should be heard en banc, the petition for rehearing was referred to and was considered and determined by the panel.

The basis of the first part of our opinion was that when a Title VII (1964 Civil Rights Act) action was dismissed without prejudice, the plaintiff against whom the order was

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

entered had thirty days to refile the complaint.[1] Failure to meet this requirement was held to result in a jurisdictional defect.

Appellant's basic argument in his brief supporting the petition for rehearing is that the Tennessee Savings Statute, T.C.A. 28-106, grants an entire year after such dismissal without prejudice to refile in the State Court. Appellant argues that this state statute is applicable because the federal statute involved gives no guidance as to time limitations.

It is clear that in civil rights actions brought under 42 U.S.C. §§ 1981 through 1988, a state statute of limitations is looked to because the federal statute is silent. *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969). However, Title VII of the 1964 Civil Rights Act is far from silent in regard to a limitations period for actions brought pursuant to the Act. It grants to claimants thirty days from the date of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) within which to file suit in the Federal District Court.

The state statute of limitations and its savings clause are never reached in this case because the federal statute is not silent. While the language of the federal statute may not cover the situation precisely, it indicates a clear policy that should be looked to before a state statute is

[1] The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned.

embraced. The federal statute provides that claimants have thirty days from receipt of a right-to-sue letter, to file law suits. If they have only thirty days to file initially, it is difficult to see why claimants should have more than thirty days to refile after dismissal without prejudice, particularly when such refiling is ordered by the Court.

The requirement of refiling within thirty days seems ample time. A complaint is easily drawn and filed; indeed, in this case all that need be done is to refile the original complaint. In these cases of alleged employment discrimination, there is no latent injury waiting to be discovered which would justify an extended period of time in which to refile. The complainant already knew what his grievance was, as it had been pending before EEOC for more than three years before he was authorized to file suit in the District Court. There is no reason not to expect expeditious processing of such claims in accord with a thirty-day requirement.

The second basis for our decision was that appellant's civil rights claims under 42 U.S.C. § 1981 were barred by the Tennessee one-year statute of limitations, T.C.A. 28-304. Appellant's employment was terminated in June, 1967, and the complaint was not filed until March 18, 1971. T.C.A. 28-304 applies to "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Appellant appears not to attack the controlling nature of this statute but rather its constitutionality. Appellant argues that the statute is arbitrary since it places the same limitations period on all federal civil rights statutes.

We see nothing about the statute that violates equal protection or due process rights of any individual. T.C.A.

28-304 is not directed solely at civil rights claims, and even if it were, it would not necessarily be arbitrary in a constitutional sense. The statute applies also to a wide variety of personal tort actions and to claims of malpractice against attorneys.

Appellant relies on *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and suggests that this statute of limitations creates an explicit racial classification. This contention is obviously unfounded because citizens of all races are entitled to take advantage of the federal civil rights statutes.

Finally, appellant argues that the filing of his Title VII claim with the EEOC tolls the state statute regarding his claims under 42 U.S.C. § 1981. In a letter supplementing his brief supporting his petition for reconsideration, appellant cites *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 (D.C. Cir. 1973), in which the Court stated in a footnote (n.30) that the filing of charges with the EEOC tolled the statute of limitations on a Section 1981 action. We decline to adopt this position.

It appears to us that the footnote in *Macklin* v. *Spector*, *supra*, is inconsistent with the rationale in the text of the opinion. Spector had argued that since no complaint had been lodged with the EEOC, plaintiff's Section 1981 action had to be dismissed. The Court held, and we think correctly, that no exhaustion of EEOC procedures was necessary to bring a Section 1981 claim, because § 1981 constitutes a cause of action separate and independent from a Title VII claim. The Court said:

> ". . . Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch

> to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F.2d at 996.

If the two actions "differ so widely in their substantive scopes" the filing of one should not toll the statute of limitations on the other. The Court suggested in the relevant footnote that the basic reason for such tolling was a Congressional desire to favor informal means of accommodation provided for under Title VII. We think that there is enough flexibility in the federal trial system so that conciliation processes will not be destroyed if a Section 1981 case is heard while a Title VII claim is being processed. *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D.Del. 1973).

In *Jenkins* the Court also held that no tolling effect on § 1981 claims took place with the filing of Title VII charges with the EEOC. The Court relied heavily on the reasoning in *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Young* held that Title VII claims and § 1981 claims were separate and independent, and that Title VII imposed no jurisdictional barriers to a § 1981 action. We agree with this reasoning and with that included in the text of the opinion in *Macklin* v. *Spector, supra.*

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

FILED
JAN 15 1974
JAMES A. HIGGINS, Clerk

Supreme Court, U. S.
FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,
PETITIONER,

v.

RAILWAY EXPRESS AGENCY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 15, 1974
CERTIORARI GRANTED JUNE 3, 1974

INDEX

	PAGE
Docket Entries	1a
Complaint, with Exhibits	4a
Exhibit 1—EEOC Final Investigation Report	14a
Exhibit 2—Letter dated February 17, 1972 from William E. Caldwell to Hon. Bailey Brown	45a
Exhibit 3—Order Dismissing Action (No. C-71-66) Without Prejudice	47a
Exhibit 4—Letter dated May 5, 1972 from William E. Caldwell to Hon. Bailey Brown	49a
Exhibit 5—Letter dated May 8, 1972 from Hon. Bailey Brown to William E. Caldwell	51a
Answer of REA Express, Inc.	52a
Motion of Defendants Tri-State Local, etc. with Appendices*	58a
Appendix A—Supplemental Complaint in No. C-71-66	60a
Appendix B—Answer of Defendants Tri-State Local, etc. in No. C-71-66	67a
Appendix C—Motion of Defendants Tri-State Local etc. in No. C-71-66, with Affidavit*	72a

* Appendix F, Supplemental Memorandum in Support of Motion, has been omitted.

PAGE

Appendix D—Interrogatories of Defendants Tri-State Local, etc. to Plaintiff, etc. in No. C-71-66 ..... 77a

Appendix E—Answer to Interrogatories of Defendants Tri-State Local, etc. to Plaintiff, etc. in No. C-71-66 ..... 86a

Appendix G—Order with Respect to Motions to Dismiss, etc. in No. C-71-66 ..... 91a

Motion of Defendant REA Express, Inc. etc. 94a

Amendment to Motion of Defendants Tri-State Local, etc. 96a

Order on Defendant Motions for Judgment 98a

Opinion of United States Court of Appeals 105a

Opinion on Petition for Rehearing 114a

* Exhibits to Affidavit have been omitted.

Docket Entries

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C-72-183

WILLIE JOHNSON, JR.,

VS.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL.

5/31/72	Filed Complaint, exhibits 1 thru 5.
5/31/72	Filed Cost Bond for $250.00, Wm. E. Caldwell, Surety.
6/12/72	Filed Stipulation Extending time to Answer through July 25, 1972.
6/27/72	Filed Answer of REA Express, Inc.
7/25/72	Filed Motion—defts Tri-State Local to Dismiss Complaint, or in alternative to grant Summary Judgment.
7/25/72	Filed Memorandum of Points and Authorities of defts. BRAC Locals in support of Motion to Dismiss or in alternative for Summary Judgment on ground of res judicata.
8/25/72	Filed Motion of the Defendant REA Express, Inc. to Dismiss the Complaint, or in the alternative to Grant Summary Judgment.

Docket Entries

8/25/72	Filed Memorandum in Support of Defendant's Motion to Dismiss or in the alternative to Grant Summary Judgment.
9/ 7/72	Filed Amendment to Motion of Defts. Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the alternative to Grant said defendants Summary Judgment.
9/25/72	Filed Memorandum in opposition of Defendants REA Express, Inc. and Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the alternative to Grant said Defendants Summary Judgment.
10/ 4/72	Filed Reply of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway and Airline Clerks to Memorandum of Plaintiff in opposition to Motion to Dismiss the Complaint or, in the Alternative, to Grant said Defendants Summary Judgment. Copy Judge.
1/25/73	Filed Order on Defendant Motions for Judgment—grant all defendants' motions and dismiss the Complaint but at the cost of REA. Copies to Caldwell, Greenberg, Belz, Highsaw and Morrow.
2/21/73	Filed Notice of Appeal by the Plaintiff. Copies to Highsaw, Belz and Morrow and Court Reporter.
2/21/73	Filed Appeal Bond in amount of $250.00. Bill Caldwell, surety.

CERTIFICATE

I, W. Lloyd Johnson, Clerk of the United States District Court for the Western District of Tennessee, do hereby certify that the above index of the docket entries is a true and correct copy of all relevant docket entries which appear on the docket in this office. This 26th day of March, 1973.

W. LLOYD JOHNSON, CLERK
BY: D.C.

Complaint

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. §§ 1981, 1982, 1983 and 1988. The jurisdiction of this court is invoked to secure protection of and to redress the deprivation of rights secured by (a) Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., providing for injunctive and other relief against racial discrimination in employment, and (b) 42 U.S.C. § 1981, 1982 and 1983, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

II.

This is a proceeding for preliminary and permanent injunctions restraining defendants from maintaining a policy, practice, custom or usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with the rights of plaintiff and other Negro persons similarly situated to equal employment opportunities at Railway Express Agency, Inc., Memphis, Tennessee, and equal labor representation

Complaint

by Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, without discrimination on grounds of race or color.

III.

Plaintiff is a Negro citizen of the United States, residing in the State of Tennessee. The defendant, Railway Express Agency, Inc., [hereafter, REA] is a corporation doing business in the State of Tennessee, and City of Memphis, and is an employer within the meaning of 42 U.S.C. § 2000e(b) in that it is engaged in industry affecting interstate commerce and employs more than tweny-five (25) persons.

IV.

Defendant, Brotherhood of Railway Clerks Lily of the Valley Local is an unincorporated association of production workers employed at defendant REA, and defendant, Brotherhood of Railway Clerks Tri-State Local is an unincorporated association of workers employed at defendant REA. On behalf of its members, defendant Union Locals enter into collective bargaining agreements dealing with the terms and conditions of employment of persons employed at defendant REA in Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Tri-State Local is 3131 Radford Road, Memphis, Tennessee. The Union Locals are a labor organization within the meaning of 42 U.S.C. § 2000e(d), and are engaged in industry affecting commerce within the meaning of 42 U.S.C. § 2000(e).

V.

Plaintiff alleges that he was employed by REA from the Spring of 1964 until the spring of 1967. Plaintiff alleges

that at all times relevant hereto REA follows a policy and practice of racial discrimination in that:

(1) Defendant REA denies Negro employees equal promotion opportunities with white employees;

(2) Defendant REA in conjunction with defendant Union Locals, assigns, reassigns, promotes and otherwise acts or fails to act in such a manner as to maintain a preexisting pattern of racial discrimination in employment;

(3) Defendant REA directs membership in defendant Union Locals according to race;

(4) Defendant REA discriminates on the basis of race in job assignments, extra work assignments and the application of seniority rules;

(5) Defendant REA employs racially dual standards for conditions of employment and discriminates against black employees in the application of disciplinary procedures and actions.

Plaintiff further alleges that he was denied the same opportunity to obtain supervisory training and promotion which the defendant Railway Express Agency, Inc. provides white employees. Plaintiff further alleges that his employment with defendant REA was terminated on June 20, 1967, because of plaintiff's race and in accordance with the racially discriminatory policies and practices set forth above.

VI.

Plaintiff alleges that he was a member of the Brotherhood of Railway Clerks Lily of the Valley Local, one of the defendant Union Locals, and that he was denied membership in the Brotherhood of Railway Clerks Tri-State Local, which at all times relevant hereto excluded blacks from membership on the basis of race. Plaintiff alleges that the Union Locals followed a policy, custom or practice of racial discrimination in that they failed to defend the rights of Negro members in the same manner in which the rights of white members were defended. Plaintiff further alleges that he was denied equal labor representation because of his race and the segregation policies and practices of defendant Union Locals, and that he, because of his race, was forced to pay higher membership dues in the black Lily of the Valley Local than his white counterparts in the white Tri-State Local were required to pay.

VII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission [hereafter, EEOC] alleging the discriminatory policies and practices set forth herein. On December 22, 1967, the EEOC issued its "Final Investigation Report" (attached hereto as Exhibit 1) and recommended that the Commission find reasonable cause to believe that defendant, REA and Union Locals had discriminated against plaintiff in that the defendants had violated rights of the plaintiff guaranteed under Title VII of the Civil Rights Act of 1964 by failing to grant plaintiff equal opportunity for employment advancement, by discriminatorily discharging plaintiff and by failing to represent plaintiff in the same manner as white employees are represented.

VIII.

(A) This is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested

herein. On or about January 15, 1971, plaintiff received a "Notice of Right to Sue" letter from the EEOC. At that time plaintiff was financially unable to employ counsel to represent him in his claims against defendants. Plaintiff had attempted to obtain counsel on his own and had been in contact with, among others, Ratner, Sugarmon & Lucas, undersigned counsel in this complaint. Ratner, Sugarmon & Lucas was unable to accept representation of plaintiff because (1) of plaintiff's poverty and his consequent inability to pay expenses of the contemplated litigation, and (2) the great number of pending Title VII cases to which this Court had appointed Ratner, Sugarmon & Lucas as counsel of record.

(B) On February 12, 1971, this Court entered orders appointing Robert E. Rose, Esq. as attorney for plaintiff and allowing plaintiff's "Notice of Right to Sue" letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a "Supplemental Complaint" was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendant Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever

filed on behalf of plaintiff in opposition to defendants' motions.

(C) On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other than Title VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA "with respect to the claim of dismissal for not giving plaintiffs supervisory training"; (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the "Notice of Right to Sue" letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants).

(D) On June 22, 1971, defendant REA propounded 41 numbered interrogatories to plaintiff. On August 9, 1971, defendant REA filed its pre-trial memorandum. The case was re-set for trial to February 2, 1972. On November 23, 1971, defendant REA pursuant to notice took plaintiff's deposition.

(E) No discovery, by depositions, interrogatories or any other manner permitted by the Federal Rules of Civil Procedure, was ever undertaken on behalf of plaintiff, and no pre-trial memorandum of points and authorities was ever filed on plaintiff's behalf.

(F) Defendant REA made a "nuisance" settlement offer of $150.00 to plaintiff, which plaintiff refused to accept

despite the insistence of his court-appointed attorney. On January 5, 1972, plaintiff's court-appointed attorney filed a motion to be relieved as attorney of record for plaintiff based on the following grounds: (1) because plaintiff's case was "questionable" in his view; (2) because plaintiff refused to accept defendant REA's $150.00 settlement offer; (3) because plaintiff was unable to substantiate monetary damages and because plaintiff "has not expressed any intention of advancing the funds that would be necessary for taking numerous discovery depositions to prepare plaintiff's case for trial." (Plaintiff denies the first and third grounds of the motion to withdraw.)

(G) Although no order was ever entered allowing plaintiff's court-appointed attorney to withdraw as counsel of record, plaintiff received a letter dated January 14, 1972, from the Honorable W. Lloyd Johnson, Clerk of this Court, stating that the motion of plaintiff's court-appointed attorney to withdraw had been allowed on the same date (January 14, 1972), that the case would have to be reset for trial from February 2, 1972, and "that if you [plaintiff] do not obtain another counsel to represent you within 30 days from this date, your claim will be dismissed without prejudice."

(H) Plaintiff contacted numerous attorneys in Memphis, but was unable to obtain representation within the time allowed. Although representation had previously been refused by Ratner, Sugarmon & Lucas, plaintiff returned to that firm toward the end of the 30-day period allowed by the Clerk's letter of January 14, 1972, and talked to undersigned counsel regarding representation of plaintiff in this matter. Although undersigned counsel was unable to represent plaintiff because of plaintiff's poverty and consequent inability to pay discovery expenses in the case, undersigned counsel did agree to attempt to secure financial support for continuation of plaintiff's cause of action. By letter dated February 17, 1972 (attached hereto as Exhibit 2) to the Honorable Bailey Brown, undersigned counsel stated that he was attempting to secure financial support for plaintiff's case and requested an additional 30 days within which plaintiff might attempt to secure legal representation. However, the Court had already, on February 16, 1972, entered an order (attached hereto as Exhibit 3) dismissing plaintiff's action without prejudice. After diligent efforts, undersigned counsel succeeded in obtaining an agreement from the N.A.A.C.P. Legal Defense Fund to underwrite discovery costs and expenses for plaintiff to continue his cause of action against defendants. Promptly after receiving such agreement, undersigned counsel, by letter dated May 5, 1972 (attached hereto as Exhibit 4), wrote Judge Brown informing him of the agreement stating that undersigned counsel had agreed to represent plaintiff and requesting that plaintiff's case be reinstated on the active docket of this Court. By letter dated May 8, 1972 (attached hereto as Exhibit 5), Judge Brown informed undersigned counsel that the proper way to handle reactivating plaintiff's case would be to file a new action. This complaint is being filed pursuant to Judge Brown's direction.

IX.

Neither the State of Tennessee nor the City of Memphis has a law prohibiting the unlawful employment practices alleged herein.

X.

Plaintiff alleges that he has no adequate and complete remedy at law to redress the wrongs alleged herein other than this suit for a permanent junction. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs and usages as set forth herein.

XI.

WHEREFORE, plaintiff prays that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date and cause this case to be in every way expedited and upon such hearing:

(1) Grant plaintiff a permanent injunction enjoining the defendants, their agents, their successors, employees, attorneys and those acting in concert with them or at their direction from continuing and maintaining the policies, practices, customs and usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiff as provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

2. Grant the plaintiff a permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them or at their direction from denying employment to plaintiff and from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering individually and/or jointly, with the rights of the plaintiff to enjoy equal employment opportunities for advancement and/or training as directed by

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

(3) Order plaintiff reinstated in the employment of defendant REA at the same position and salary level and with the same benefits to which he would be entitled but for his unlawful termination.

(4) Grant the plaintiff judgment in the amount of back pay, including all raises, bonuses and fringe benefits, to which he would have been entitled, and union membership dues which would not have been paid, but for the discriminatory policies and practices complained of herein.

(5) Award plaintiff the costs of this action, together with reasonable attorney's fees as provided in Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. §2000e (5)(k).

(6) Grant plaintiff such other, further, additional and/or alternative relief as the needs of justice require.

Respectfully submitted,

RATNER, SUGARMON & LUCAS

By: /s/ WILLIAM E. CALDWELL
WILLIAM E. CALDWELL
URAL B. ADAMS, JR.
525 Commerce Title Building
Memphis, Tennessee 38103

JACK GREENBERG
WILLIAM L. ROBINSON
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Exhibit 1 (To Complaint)

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: December 22, 1967

To: Director of Compliance

FROM: Walter M. Dickerson

SUBJECT: Willie Johnson et al.
vs
Railway Express Agency
and
Brotherhood of Railway Clerks
Tri-State Local
Memphis, Tennessee
and
Brotherhood of Railway Clerks
Lily of the Valley Local
Memphis, Tennessee

Case Numbers: NO 7-6-822 & U
thru
NO 7-6-828 & U
NO 68-8-148E
NO 6-10-205
NO 6-10-152

FINAL INVESTIGATION REPORT

I. THE CHARGE:

All of the Charging Parties allege that they have been discriminated against because of their race (Negro).

Exhibit 1 (To Complaint)

Willie Johnson, Lorenza McGaha, James Tinnon, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that:

1. The unions maintain racially segregated locals; Tri-State Local for white members and Lily of the Valley Local for Negroes.
2. The cost of membership is greater with the Negro local.
3. The firm directs membership affiliation according to race.
4. The firm dscriminates against Negroes on the extra work list with respect to the seniority rules and job assignments.

In addition, Willie Johnson also alleges that:

1. The firm employs dual standards, based on race, for conditions of employment and disciplinary action.
2. The firm required him to sign an undated resignation form a year before it was executed.

William Worsham, Thomas Thornton and James Oliver allege that they were terminated by the firm because they are Negroes.

II. CHRONOLOGY OF EVENTS:

May 31, 1967	Willie Johnson, Lorenza McGaha, James Tinnion, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd file with EEOC

Exhibit 1 (To Complaint)

June 20, 1967	Willie Johnson terminated by firm
September 6, 1967	Willie Johnson amends charge with EEOC
June 27, 1967	William Worsham employed at firm
July 27, 1967	William Worsham terminated
August 1, 1967	William Worsham files with EEOC
August 24, 1966	Thomas Thornton employed at firm
September 3, 1966	Thomas Thornton terminated
September 12, 1966	Thomas Thornton files with EEOC
August 3, 1966	James Oliver employed at firm
September 22, 1967	James Oliver terminated
September 27, 1967	James Oliver files with EEOC
October 20, 1966	EEOC cases for Thomas Thornton and James Oliver assigned for investigation
September 5, 1967	EEOC cases for Thornton and Oliver assigned for re-investigation

III. BACKGROUND:

Memphis, Tennessee is located on the northwest border of the State of Mississippi, along the Mississippi River, and it is the highest populated city in the State.

Exhibit 1 (To Complaint)

The present population, projected by possible accretions from the 1965 census by the New Orleans EEOC Regional Office, is 766,000 for the Memphis Standard Metropolitan Statistical Area. It is estimated that Negroes represent 38.4% of the total population.

The area's economy is enhanced by a diversification of industries: manufacturing, transportation, agricultural, governmental, banking, and others. Major industries in the area include: E. I. DuPont de Nemours & Company, Kellog Company, Kimberly-Clark, Buckeye Cellulose, Armour and Company, and others. The health industry puts about $200,000 daily into the community's economy. (Memphis Chamber of Commerce).

Industrial employment statistics indicate that Negro employment is highest among the blue collar workers (40% Negro), laborers (64.2% Negro), operatives (37.1% Negro), and service workers (46.3% Negro). (These statistics have been obtained from a compilation of EEO-1 reports by the New Orleans Regional Office of the EEOC).

The Respondent has been the subject of previous EEO investigations, two of which are incorporated in this report for re-investigation; is a Plans for Progress Firm; meets the definition of Employer under Title VII of the Civil Rights Act of 1964 and is a government contractor, the predominant interest agency being the U.S. Army.

Employees at the firm are represented by the Brotherhood of Railway Clerks and both the firm and the union are within the jurisdiction of the EEOC.

Exhibit 1 (To Complaint)

The national office of the Respondent firm is addressed:

210 E. 42nd Street
New York, New York

IV. SUMMARY OF THE INVESTIGATION:

A. Position of the Charging Parties:

1. Willie Johnson, Lorenza McGaha, James Tinnion, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that the Respondent firm practices discrimination against Negroes in the manner in which the seniority rules are applied and in job assignments on the extra work list. (Tab B-1).

The Charging Parties stated that when work falls off, employees are laid off by seniority and placed on a day-to-day call basis. They claim that such persons are placed on an extra work list and are intended for recall to work on a seniority basis. However, continued the Charging Parties, Negroes are not considered for recall to various non-traditional jobs such as foremen, and clerk. They said Negroes are called back, regardless of their seniority, for jobs as freight handlers or truck drivers when actually all employees on this extra work list are classified to do jobs in all areas. (Tab B-1). Aaron Kern stated that he entered a bid as Chauffeur (Truck Driver) during the time that there were no Negroes n that classification. He said that this resulted in his foreman telling him that he ha dbeen terminated. After much

Exhibit 1 (To Complaint)

discussion, claims Kern, the foreman had him sign an undated resignation form and told him that if he ever "messed up" again the foreman would date and execute the form.

Kern claims that white employees were "passed around" him because of job classification that he was not permitted to hold. He said that this resulted in his seniority being displaced behind the white employees who were actually junior to him (Tab D-4). All of the remaining Charging Parties entered supporting statements (Tabs D-3 thru D-7).

Seven witnesses, contacted by the Investigator, supported the contentions of the Charging Parties that the extra work list arrangement discriminates against Negro employees in the manner in which job assignments are made. All of the witnesses claim that Negroes are called in to perform duties of Freight Handlers or Truck Drivers and, in some rare instances, Negroes have been called as Checkers. (Tabs D-8 thru D-14).

Jesse Whitfield (witness) stated that the firm has not elected to permit his being trained as a Checker yet white employees who are junior to him have been given this opportunity. (Tab D-9).

Robert Boykin, (witness) stated that his foreman assigned him to a Checker job only to have another foreman change the assignment (Tab D-11).

Exhibit 1 (To Complaint)

Albert McCulley stated:

"The firm employs and trains white employees as Clerks, Checkers and Foremen over senior qualified Negroes with more experience."

". . . Regular employees are not allowed to 'bump' on jobs in which they are not qualified. Negroes are not given the opportunity to qualify on these jobs as extra board employees—white employees are.

Supervisors tests are administered by the firm. Management approaches the employee to take the test. No Negro has ever been approached by management to take the test. . ." (Tab D-13).

2. Willie Johnson, in an amended charge, stated that the firm employs dual standards, based on race, for conditions of employment and disciplinary action. He said that he was terminated from the firm after being required to sign an undated resignation form a year before it was executed. He said that the error he committed, that resulted in his termination, is common-place among white employees. (Tab B-2).

Expanding on his statement, Johnson said:

"About one year ago, as a result of my taking off from work to attend a funeral of my Aunt, the firm forced me to sign an undated resignation form. This action was prompted

Exhibit 1 (To Complaint)

by my foreman, a Mr. Pittman, who gave the wrong information to his superior about my absence."

"About February or March of this year, I encountered an accident in the operation of a tractor and trailer truck that I was just learning to operate. I misjudged the height of an underpass and bumped the truck into it."

"On Monday, June 19, 1967, while making my first deliveries as a truck driver, I inadvertently accepted the wrong receipts from a customer. I had come upon the job of truck driver by 'bumping' a junior white employee. My foreman, Mr. Anderson, called my attention to the error and I was sent back to the customer to obtain the correct receipts, which I did. It was then that the firm entered a current date on the resignation (form) that I had signed over a year ago. This practice is commonplace with the firm in its dealings with Negro employees."

Charging Parties Kern, Elliott, McGaha, and Boyd all support Johnson's statement that he was required to sign an undated resignation form and that the error he committed is commonplace among white employees (Tabs D-4 thru D-7).

Jesse Whitfield (witness) stated that white employees are generally given better treatment and Negroes are dealt with more severely.

Exhibit 1 (To Complaint)

He said that Willie Johnson was terminated because he "stood up for his rights" and white employees are seldom disciplined (Tab D-9).

Robert Caldwell (witness) stated that he had observed Foreman Cornelius harassing Willie Johnson (Tab D-10).

Robert Boykin (witness) stated that he felt that Willie Johnson was fired because he (Johnson) was outspoken. Boykin also said that he had observed Foreman Cornelius harassing Johnson on many occasions (Tab D-11).

Albert McCulley (witness) stated:

"... The firm deals more severely with Negro employees than with white employees." (Tab D-13).

Archie Parson (witness) stated that the foremen and supervisors are usually more severe in giving work orders or according disciplinary measures against Negroes (Tab D-14).

3. William Worsham, Thomas Thornton and James Oliver allege that they were terminated by the firm because of the discriminatory practices employed by the firm against Negroes (Tab B-3).

Thornton stated that he applied for work on August 23, 1966, and started with the firm on August 24, 1966. He claims that his work was satisfactory and he had no problems until his foreman addressed him as "boy". After taking exception to the manner in which he was

Exhibit 1 (To Complaint)

addressed, Thornton claims that he was subsequently terminated because of the incident (Tab B-3, page 1).

James Oliver alleges that after about six weeks of employment he was terminated and the reason given was that he had a police record. Oliver stated that he had been arrested but had gained employment at the U. S. Post Office where the security requirements were higher than at REA. He feels, therefore, that he was discriminated against by REA because he is a Negro (Tab B-3, page 2).

In an interview with a previous investigator, Oliver stated that the firm hires Negroes for six weeks and then at the end of that period 9 out of 10 are laid off. He said that white employees are hired but he doesn't know of any who are laid off (Tab D-2).

B. Position of the Respondent.

On September 20, 1967, two investigators, Odell Clark and Walter Dickerson, keeping a prearranged appointment made by telephone, met with Mr. A. A. Steward, Manager for the Memphis Terminal for the Respondent. Mr. Steward receipted service of the charges (Tab C). Mr. Steward then told the investigators that they could telephone either him or the District Superintendent at St. Louis, Missouri, at a later date for any information they might need. After an explanation of the procedures of the EEOC investigation, Mr. Steward stated that he would have to confer with

his District Superintendent and that, for security reasons, he was certain that the records of the firm could not be examined. Mr. Steward then terminated the conversation.

On September 12, 1967, acting on information gained through an investigation of the Respondent at another locality, a telephone call was placed to the national office of the firm at New York City. The investigator spoke with the Vice President of Personnel Services with the Respondent, Mr. Clement Lane. Mr. Lane expressed dissatisfaction over the fact that local officials were uncooperative in such matters and said that he would look into the situation.

On September 19, 1967, Mr. G. L. Hall, Division Operations Manager at the Memphis Terminal, telephoned the investigator and set an appointment for the following day.

The investigators met with Mr. Hall and Mr. Steward at a site removed from the Memphis Terminal in the general offices located in the I. C. Railroad Building. This made the investigation difficult from the standpoint of examining records over and above those brought into the conference room by the Respondent. Mr. Hall categorically and emphatically denied all allegations.

Directing the investigation to the attention of paragraph 3 of the charges by seven Charging Parties, Mr. Hall stated the extra work list is administered in strict accordance with seniority and qualifications. He said that in order to bid on

a position, the employee must first have knowledge of the job. Hall said that temporary positions from the extra work list are not posted for bid.

Hall said that Willie Johnson was terminated for failing to follow instructions. He said that a hearing was conducted and Johnson was found guilty of insubordination in that he did not do what his foreman told him to do.

A request for copies of the hearing concerning Johnson was refused by the firm. Subsequent requests were, too, refused (Tab J).

Both Hall and Steward readily admitted that they employ the practice of requiring an employee to sign an undated resignation form. However, they contend that such requirements are made of both white and Negro employees. Johnson, they said, was terminated by simply filling in the current date on a form that he had signed a year earlier.

Hall stated that William Worsham was terminated under the provisions of the national contract that, "Employees must comply with the wishes of persons he is employed under." Hall said that this is reflected in Worsham's work record. Hall could not quote the section of the agreement that covered the matter but he stated that he would provide a copy of the contract. Hall said that he had no personal recollection of the situation involving Worsham but he had read the records of the case.

Mr. Steward said that he did not recall Mr. Worsham and that the picture attached to the application, "Didn't ring a bell". Steward offered that

Exhibit 1 (To Complaint)

some employees are terminated without being given a reason for termination. He said that such instructions are contained in the security regulations (Tab F-14).

Hall stated that the OJT program is administered without prejudice. He said that a record of all employees who are hired, fired, or quit, is sent to both unions monthly. When queried as to what he meant by both unions, Steward answered the question that was asked of Hall with, "The one for the niggars and the one for the whites."

Hall admitted that there were no Negro supervisors, foremen, clerks, cashiers, adjusters, telephone operators or money deliverymen. Hall said that the firm employs the use of a Supervisor's Test for promotion to Supervisor. He said that the method of selection is that a man must show intelligence and that a candidate is personally observed by the Manager and the Superintendent and may be assigned on an acting basis for this period of observation. Hall said that such a person might come from the ranks or hired from outside. Women are not considered, he concluded.

Steward added that a successful applicant must have had supervisor's experience and *must have been classified as a foreman.*

Hall said that most Negroes are Express Handlers and assorters. He said that there were some Negro Chauffeurs (Truck Drivers) and some Checkers. Hall hastened to point out that there was only the difference between $126.00 per week and $128.00 per week in most of the job classifications.

Exhibit 1 (To Complaint)

The Respondent firm was not cooperative in providing the documentation necessary for the investigation. Hall stated that an EEO-1 had been prepared during the normal reporting period and sent to the national office. Further correspondence on the matter had negative results (Tab J). Hall refused to produce records of the hearings concerned with the termination of Willie Johnson. Again correspondence on the matter did not result in obtaining the records (Tab J). The request for work records of certain employees produced typewritten job progression information (Tabs F-3, 8, 9 & 10).

NOTE: At this point, because of previous commitments concerned with another case, one investigator left the investigation which was completed by the writer.

During the initial interview, Mr. Steward gave the following account of the events leading to the discharge of Willie Johnson:

"Willie was assigned to pick up at three locations within one firm (International Harvester). He did not sign the necessary documents at one stop. At another he signed the documents but didn't pick up the freight. He billed one shipment collect instead of prepaid".

"He was told to return to International Harvester immediately upon starting his route the next day to correct the mistakes he had made. This would mean that if he had followed instructions he would have reached the customer around 11 a.m. or 12:00 noon. At 2:00 p.m., the Traffic Manager at Inter-

national Harvester called to say that Johnson still had not arrived. W. S. Anderson, a foreman, gave Johnson the instructions to go to the customer immediately". (Tab E-1).

The investigator interviewed Mr. W. S. Anderson, foreman with the Respondent.

Mr. Anderson stated that he personally gave Johnson instructions to straighten out the error first. He said that he allowed Johnson to load his truck and proceed in a normal manner. He stated that his only instructions were to straighten out the order with International Harvester before he went anywhere else. Anderson said that he had no idea as to when Johnson left the loading dock. The first indication he had that Johnson had not followed instructions was when Mr. R. J. Fergerson, the Assistant Manager, said that International Harvester had called.

Anderson stated that Johnson would have been cited for the error anyway even if he had corrected the error. Anderson did not recall the chain of events involved in the error Johnson allegedly committed. He didn't recall his specific instructions to Johnson beyond telling him to correct the errors before he mad other deliveries or pick-ups. (Tab E-7)

The investigator met with Mr. R. J. Fergerson, Assistant Manager with the Memphis Terminal. Mr. Fergerson stated that he did not recall William Worsham nor the circumstances surrounding his termination. He did recall that Willie Johnson was terminated for insubordination. He said

that previous demerits or past record was not a factor in Johnson's termination *because insubordination is automatic termination.* On other subjects, Fergerson contended that he practiced EEO policies that were given to him through the manager. He said that there were no formal EEO meetings and that there was no discrimination at the plant.

Fergerson said that there were no Negro foreman or clerks because Negroes had not bid on such jobs. He said that such jobs that were considered non-bid jobs were not filled by Negroes because they didn't have sufficient seniority to be appointed (Tab E-5).

C. Union Situation:

Charging Parties Johnson, McGaha, Tinnion, Gilliland, Elliott, Kern and Boyd allege that the union maintains racially segregated locals; Tri State Local for white members and Lily of the Valley Local for Negroes. They further allege that the cost of membership is greater with the Negro local.

The Respondent firm admitted that the locals of the Brotherhood of Railroad Clerks were racially segregated but offered little other information. Hall denied that the firm referred Negroes to the Lily of the Valley Local and white employees to the Tri State Local. He said that the only information provided the new employee is that union membership is available to them after 60 days employment.

Exhibit 1 (To Complaint)

Hall verified that the dues are $5.00 with the Lily of the Valley Local and $4.00 with the Tri State Local. Hall stated that the union contract is negotiated on a national level and that he has little contact with the local officials.

Mr. Steward stated that he did not have local addresses for the unions, but that mail addressed in care of Railway Express at Memphis would be delivered to the proper parties. He stated that the chairman for the white local worked in the office at the firm and the chairman for the Negro local worked for the I. C. Railroad.

Many unsuccessful attempts were made to contact the officials of the local unions. Since it was determined that all of the allegations, concerned with the union, had been answered in the investigation, the charges were served by mail (Tab I).

D. Plant Tour:

The plant tour showed that all of the restrooms have been recently renovated with the removal of walls to end the discriminatory practice of segregated restrooms. Lockers are arranged in areas adjoining the restrooms and Mr. R. J. Fergerson, the Assistant Manager for the firm, said that the lockers were assigned in a non-discriminatory manner. There was no visual contact made of employees using the locker area, however, random conversation with several employees in the work area indicated that there were no problems concerned with locker or rest areas. There are no official lunch rooms and there is no cafeteria.

Exhibit 1 (To Complaint)

Conversation with one un-named Negro employee produced the fact that he is an extra board employee and that he was called to work jobs as Express Handler and Assorter only. He said that white employees who are junior to him are often called to work as clerks, checkers, or foremen. He said that some few Negroes had been called as checkers. Assistant Manager Fergerson witnessed the conversation.

EEO posters were displayed in proper places. Conversations with Assistant Manager Fergerson, Foremen Cantrell, Anderson and McClunney indicated that they were verbal in stating that there were no discriminatory practices at the firm, but had no formal exposure to meetings, publications or discussions on company policy.

At the time of the plant tour, questions concerning the duties of various employees were put to Mr. Fergerson. There were no Negroes observed working in capacities other than Express Handlers and Assorters.

E. Closing Letter

Because of the difficulty in obtaining documents and the firms failure to respond to communications, a delayed closing letter was mailed on December 21, 1967.

F. Exit Interview

The exit interview did not produce any new information concerned with the investigation except that Charging Party Willie Johnson has obtained

Exhibit 1 (To Complaint)

legal council in his case. His lawyer, Mr. Louis R. Lucas, of Ratnee, Thomson, Sugarmon, Lucas & Willis at Memphis, wishes to be informed of any contact made with his client.

Mr. Johnson's rebuttal is incorporated in this report (Tab D-3 page 2).

V. Investigative Conclusions—Alleged Violations

A. Willie Johnson, Lorenza McGaha, James Tinnian, W. E. Gilliland, Claude Elliott, Aaron Kern and Noble Boyd all allege that:

1. The unions maintain racially segregated locals. The investigation showed that:

   a) Employees at the Respondent Firm are represented by the *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* (Tab H-1)

   b) The Tri State local of the above union represents white employees at the Respondent firm and the Lily of the Valley local represents Negro employees. This fact is attested to by all of the Charging Parties and all of the witnesses (Tabs D-3 thru D-14). The Respondent firm admits the charge is accurate (Tabs E-1 & E-2).

2. The cost of membership is greater with the Negro local. The investigation showed that:

   a) The cost of membership with the Lily of the Valley Local (Negro) is $5.00 per month. The cost of membership with the Tri State

Exhibit 1 (To Complaint)

Local (white) is $4.00 per month (See Tabs B-1 & E-1)

3. The firm directs membership affiliation (union) according to race. The investigation showed that:

   a) The firm denied that it directs which local an employee should affiliate with (Tab E-2).

   b) Conversation with the Charging Parties and witnesses and random conversation with Negro employees at the firm indicate that a form is given to them by the firm for union membership.

   The personnel section at the firm makes the transaction and dues are withheld. This places the responsibility of assignment upon the firm.

4. The firm discriminates against Negroes on the extra work list with respect to the seniority rules and job assignment. The investigation showed that:

   a) The firm denies the charges (Tab E-2).

   b) The extra work list, selected at random dates, show that Negroes are called for Assorters jobs, Express Handlers and some Chauffeurs (Truck Driver) almost exclusively. The only other job category that Negroes are called into on some rare occasions is that of Checkers.

Exhibit 1 (To Complaint)

The list of jobs and their code number (Tab F-2), when compared with the extra work list (Tab F-1) shows many examples of senior Negroes being confined to one or two job categories. The agreement (Tab I) states that employees are to be called in the order of their seniority and the senior person given his choice of jobs *if he qualifies*. Negroes are not given this preference of jobs and, thereby, never qualify for positions where Negroes are not permitted to work.

Candidly the extra work list (Tab F-1) shows that on January 9, 1967, the two senior most employees are White, Winsett and Bailey. Winsett was called in to perform job number 51. This is the code for Telephone Operator (Tab F-2). Bailey was called in to work in the city office. The next person on the list is a Negro, McCulley, and he was called in as an Assorter. Following him is another Negro, McGaha, who was also called for the Assorter job.

Mullins, a white employee, was called next to fill a clerical position which is not coded on the work sheet. Four white employees follow and all were assigned duties other than assorter. Following these four is a Negro, Boyd, who was called in as an Assorter. On this date, only one white employee was called in as an assorter. His name is Evans and he is eleventh in the

Exhibit 1 (To Complaint)

order of seniority. Only one Negro was called in as a chauffeur, Hampton, who appears twentieth in the order of seniority (Tab F-1 pages 1-2-3).

All of the entries on the extra work list show the same pattern from January 9, 1967, thru April 26, 1967 (Tab F-1).

c) The seniority roster of all employees at the plant shows a history of discrimination. White employees seniority dates from 1917 and the senior Negro at the plant was hired in 1944. He is still an Assorter. There are no Assorters under him until the next two Negro names are reached (Tab F-2, page 5).

d) The effects of this manner of job assignment is demonstrated clearly in the case of Charging Party, Aaron Kern, Kern claims that white employees were "passed around" him because of job classifications he was not permitted to hold. He said that this resulted in his seniority being displaced behind the white employees who were actually junior to him (Tab D-1). Kern was hired on August 13, 1964. His seniority date is December 6, 1965. (The seniority date is the date on which an employee is accepted off the extra list to a permanent position). Warren, a white employee, was hired on February 11, 1965, yet, he has a seniority date of November 29, 1965, which places him above Kern in the order of seniority because he

Exhibit 1 (To Complaint)

was able to accept a position before Kern. Evans, another white employee, was also placed above Kern (Tab F-2, page 7).

Even more demonstrative of this situation is the case of Noble Boyd, a Charging Party. Boyd was employed on September 12, 1964, and now holds seniority below three white employees who were hired on November 25, 1964, November 12, 1964, and September 27, 1964, respectively (Tab F-2, page 7).

The white employees involved in the above situation are Wright, Maxey, Johnson, Evans and Warren. Maxey is currently a Relief Foreman—Money Clerk, and Warren is a Foreman—Money Clerk (Tab F-10), positions that Negroes have never held.

Of the Two Negroes, Kern is now an Assorter (Tab F-9) and Boyd is an Assorter who works as a relief Chauffeur (Tab F-8).

B. Willie Johnson alleges that:

1. The firm employs dual standards, based on race, for conditions of employment and disciplinary action. The investigation showed that:

   a) The firm denies the allegations (Tabs E-1 & E-2)

   b) The firm does employ dual standards for conditions of employment as concluded in part A above.

Exhibit 1 (To Complaint)

c) In conversation with the Charging Parties, the investigator requested names of white employees who might be classified as "bad actors" or employees who were problematical with respect to discipline. The names provided were J. B. Smith, V. B. Alderson, L. H. Childress, J. C. Limbaugh and J. H. Martingals. This was done for comparative purposes with Willie Johnson. J. B. Smith's record is as follows: (Tab F-7).

Date	*Violation*	*Penalty*
3/18/58	Damaged vehicle	5 demerits
2/26/62	Damaged vehicle	10 demerits
3/26/62	Failed to lock truck	10 demerits
7/13/63	Failed to value shipment	10 demerits
9/27/64	Damaged vehicle	10 demerits
8/ 5/65	Damaged vehicle	15 demerits

J. H. Childress (Tab F-6) record is as follows:

9/ 6/63	Damaged vehicle	10 demerits

J. C. Limbough's (Tab F-5) record is as follows:

12/ 7/63	Insubordination & Damaged vehicle	20 demerits
12/29/63	Absent without permission	15 demerits

Exhibit 1 (To Complaint)

There were no disciplinary actions taken against V. B. Anderson and J. H. Martindale, according to the Respondent (Tab F-4).

Willie Johnson's record is as follows: (Tab F-3)

Date	*Violation*	*Penalty*
8/11/66	Violation of rules 59 & 64 (Absence without permission & failure to follow instructions)	Six days Suspension
2/21/67	Damaged vehicle	20 demerits
3/30/67	Damaged utility pole	20 demerits
6/22/67	Violation of Rule 64 (Insubordination)	20 demerits and resignation

It is pointed out that J. B. Smith had a record of damaging vehicles on four occasions which resulted in penalties of from five to fifteen demerits. Johnson received no less than twenty demerits for this infraction. Childress, another white driver, received 10 demerits for the same infraction. Limbaugh committed *identical* infractions with Johnson. Both Limbaugh and Johnson were charged with insubordination. Limbaugh received 20 demerits and Johnson was terminated. Limbaugh was charged with

Exhibit 1 (To Complaint)

absence without permission and drew 15 demerits. Johnson was suspended for six days for the same infraction. Johnson's infraction was incorporated into two charges, in that he failed to follow instructions (Insubordination, rule 64) by not notifying his foreman of an intended absence which is a violation of rule 59 (Tab H-2). Limbaugh's infraction was not compounded in this manner.

d) By admission of the Respondent, Johnson was required to sign an undated resignation form (Tab E-1) on the date of his first infraction of the company's rules (Tab G-1). The form was executed a year later when he was charged with insubordination. Thus, the notation of "resigned" appearing on Johnson's record (Tab F-3) is, in effect, termination.

e) Respondent officials stated that insubordination is automatic termination (Tabs E-1, E2, E-5, E-7). Apparently this does not apply to white employees with the same charge as is indicated on Limbaugh's record. (Tab F-5)

2. Willie Johnson also alleged that the firm required him to sign an undated resignation form a year before it was executed. The investigation showed that:

a) By admission of the Respondent (Tab E-1) and as stated above under Section 1, part

e, such requirements were made of the charging party.

b) The firm produced records to show that other such forms are on file against Aaron Kern, a Negro, and J. B. Smith, a white employee (Tab F-12). However, as stated above in this report, there is evidence that leads to the conclusion that disciplinary action is taken more severely against Negroes. The firm did not produce evidence that the form has been executed against white employees as it was in Johnson's case. Too, in Johnson's case, the form was executed against him as alleged.

c) William Worsham, Thomas Thornton and James Oliver alleged that they were terminated by the Respondent because they are Negroes. The investigation showed that:

1. William Worsham, according to the Respondent, was terminated under the provisions of the national contract which, they said, states that, "an employee must comply with the wishes of the person he is employed under." (Tab E-2)

2. The firm's manager, Steward, did not recall why Worsham was fired. (Tab E-1). This bears out Worsham's statement that, "Each supervisor I approached told me they didn't know why (I was terminated). This included Mr. A. A. Steward, the manager, who told me

that a lot of things goes out over his signature that he knows nothing of." (Tab D)

Superintendent Fergerson stated that he didn't know why Worsham was fired (Tab E-5) although it was Hall, the Division Operation Manager, who stated that Worsham was terminated under the terms of the national contract. Hall further stated that many employees are terminated without being given a reason because of security regulations (Tab E-2). Hall read off a paragraph from the security regulations which states, "Do not inform employees that they are being discharged because of security reasons." (Tab F-14). Yet, Hall failed to state that Worsham was terminated for security reasons.

3. Worsham's records do not reflect any adverse work habits or security risk information (Tab F-15).

4. Information reported to the union states only that Worsham's application was not accepted (Tab F-13, page 1).

5. Foremen in Worsham's work area display little working knowledge of company policy on EEO. (Tab E-5, E-7).

6. Worsham's records contain a photograph of Worsham which represents, in effect, racial designation, and the records re-

Exhibit 1 (To Complaint)

fleet that Worsham completed 2 years college and good references from previous employers (Tab F-15).

1. Thomas Thornton and James Oliver, according to the Respondent, were terminated because the Security Officer, Mr. Oslin, refused to approve them (Tab E-4).

2. Contact with Mr. Oslin produced information that he knew nothing about the charging parties nor of the MDTA Program they were a part of. He knew nothing of special security requirements of MDTA (Tab E-6).

3. Contact with the Memphis Police Department produced evidence that Oliver, while attending college at Lamar, was arrested for disorderly conduct on March 23, 1956. The charges were subsequently dropped on March 26, 1956 (Tab D-1).

4. Oliver passed the United States Postal Security measures and spent 3½ years working in the Post Office prior to his employment with REA and after the Lamar incident (Tab D-1).

5. Contact with the Memphis Police Department showed that Thomas Thornton was arrested on April 23, 1964, and charged with disorderly conduct and discharging a gun inside the city limits. The disorderly conduct charge was dismissed

Exhibit 1 (To Complaint)

on April 26, 1966 and he was fined $50.00 for shooting within the city limits (Tab D-1).

6. Thornton, after being discharged by REA, passed the Postal Security and went to work at the Memphis Post Office. He was still employed there at the time of the investigation (Tab D-1).

7. James Oliver's work record (Tab F-16) shows that a photograph was attached to his application. there are no adverse work habits noted; no security risk information; he scored high on the pre-employment test; received an honorable discharge from the U.S. Air Force, and spent one year in college as an elementary education major. He received good recommendations from previous employers.

8. The work record of Thomas Thornton shows a photograph was attached to his application; there are no adverse work habits noted; no indication of action by security officials; he received an honorable discharge from the U.S. Marines, and he completed one year of college at Tuskegee (Tab F-17).

9. Thornton claimed that his trouble began when he took exception to being called "boy" (Tab B-3, page 1 and Tab D-1). Steward, the manager for the Respon-

Exhibit 1 (To Complaint)

dent, continually refers to Negroes as Niggras. (Tab E-1). Brodie Bowen, Jr. (witness) stated that, "White employees of equal rank want Negroes to address them as "Mister". (Tab D-8). Charging Party Elliott (Tab D-5) makes the same statement. All of the charging parties and witnesses testified that Negroes are generally discriminated against and suffer abuses.

During the investigation, the Respondent mentioned that women are not considered for promotion to supervisor (Tab E-2). Too, women are employed in various laborers and operatives classifications by the firm in localities other than Memphis (Case Number CC-6-9-7919; N.O. 6-9-16). The respondent also stated that new hires are considered for employment as supervisors if they have the necessary qualifications.

Exhibit 2 (To Complaint)

February 17, 1972

Honorable Bailey Brown
Chief United States District Judge
Federal Building
Memphis, Tennessee

RE: Willie Johnson v. Railway Express Agency, Inc.
No. C-71-66

Dear Judge Brown:

Mr. Willie Johnson has contacted me regarding representation in the above-entitled case. As I understand the facts, Mr. Johnson's previous attorney was permitted to withdraw from this case and Mr. Johnson was given thirty (30) days within which to secure new counsel or the case would be dismissed.

Mr. Johnson has been unable to secure other counsel, and I am also unable to represent him because of the apparent discovery expense that would be involved. Nevertheless, I have agreed to seek financial support for Mr. Johnson's case and, if such support can be obtained, I would be willing to represent him.

Although I do not represent Mr. Johnson at this time, I have agreed to ask the court in his behalf to grant an additional thirty (30) days within which he can attempt to secure legal representation and so that I may assist him in this matter. I am therefore requesting on Mr. Johnson's

Exhibit 2 (To Complaint)

behalf that he be given thirty (30) additional days within which to secure counsel for representation in the above-entitled matter.

Very truly yours,

William E. Caldwell

WEC:pw

cc: Willie Johnson
4325 Loral Cove, Memphis, Tenn.

Exhibit 3 (To Complaint)

Feb 18, 1972

In the United States District Court

For the Western District of Tennessee

Western Division

Civil No. C-71-66

Willie Johnson, Jr.,

Plaintiff,

v.

Railway Express Agency, Inc., et al.,

Defendants.

Order Dismissing Action Without Prejudice

In this cause, this Court heretofore appointed Robert Rose of the Memphis Bar to represent this plaintiff, as well as the plaintiff Thomas Thornton in C-71-2, which are EEOC claims by these plaintiffs against REA Express and others. Thereafter, after various proceedings in these matters, counsel for the plaintiffs appeared in court and stated that he had managed to obtain an offer of settlement from REA Express, that plaintiff Thornton had agreed to accept the settlement, but plaintiff Johnson was unwilling to do so. Counsel further stated to the Court that in all frankness, in view of the staleness of the claim and other reasons, he had strongly recommended these settlements, but had been unable to persuade plaintiff Johnson to accept. The cases were set for trial on February 2, 1972, and Mr.

Exhibit 3 (To Complaint)

Rose filed a motion on or about January 7, 1972 to be relieved as attorney for plaintiff Johnson, which the Court granted on January 14, 1972. On the latter date, the Clerk of this Court, under direction of the Court, wrote to plaintiff Johnson stating that Mr. Rose had been relieved, that the setting for trial on February 2, 1972 would have to be reset, and that plaintiff Johnson was allowed 30 days from that date to obtain other counsel or his case would be dismissed without prejudice. Since such 30 days have passed without plaintiff having obtained such counsel and so notifying the Clerk as he was directed, this cause should be dismissed without prejudice.

It is therefore ORDERED and ADJUDGED that this action be and the same is hereby dismissed without prejudice.

ENTER this 15th day of February, 1972.

BAILEY BROWN
Chief Judge

Exhibit 4 (To Complaint)

May 5, 1972

Honorable Bailey Brown
Chief United States District Judge
Federal Building
Memphis, Tennessee 38103

RE: Willie Johnson v.
Railway Express Agency, Inc.
No. C-71-66

Dear Judge Brown:

I wrote the Court on February 17, 1972 indicating that I was seeking financial support on behalf of Mr. Willie Johnson, plaintiff in the above-referenced case, with a view toward representing him in this matter if such financial support could be obtained. At the time of my letter, however, the Court had previously, on February 16, 1972, entered an order dismissing Mr. Johnson's action for failure to obtain legal representation, but without prejudice.

At the time of my letter of February 17, I immediately set about seeking to obtain financial support for Mr. Johnson's cause of action. The NAACP Legal Defense Fund has agreed to underwrite costs and expenses to carry on this litigation. I have, therefore, agreed to represent Mr. Johnson in the above-entitled cause, and ask that this letter be treated as an entry of appearance as attorneys for the plaintiff by myself and Mr. Ural Adams of this office.

Since issue is joined as between plaintiff and defendant REA, and since the Court dismissed the action without prejudice, it seems to us that the most efficient way to

Exhibit 4 (To Complaint)

proceed would be to reopen the case in its February 16, 1972 status. We, therefore, request that the order dismissing the action entered on February 16, 1972 be vacated, and that this cause of action be reinstated on the active docket of the Court.

If counsel for REA objects to our suggested procedure, or if the Court otherwise feels that this matter should be handled in a formal manner, we will file a motion in accordance with the foregoing.

Very truly yours,

William E. Caldwell

WEC:pw

cc: Saul C. Belz, Esq.
Attorney for Defendant
Hon. W. Lloyd Johnson, Clerk

Exhibit 5 (To Complaint)

8 May 1972

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

Mr. William E. Caldwell
Attorney at Law
525 Commerce Title Building
Memphis, Tennessee 38103

Re: Willie Johnson v. Railway Express Agency, Inc.
Civil No. C-71-66

Dear Mr. Caldwell:

I have your letter of May 5, 1972.

It appears to me that the proper way to handle this matter would be to file a new action since the old one has long since been dismissed.

Yours very truly,

/s/ BAILEY BROWN
Bailey Brown
Chief Judge

BB:asw

CC: Mr. Saul C. Belz
Mr. W. Lloyd Johnson, Clerk

Answer of REA Express, Inc.*

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Comes now the defendant, REA Express, Inc. and files this its separate answer to the original complaint filed herein and would show the Court as follows:

1. The complaint fails to state a claim upon which relief can be granted against the defendant REA Express, Inc.

2. That with regard to the allegations of the complaint pertaining to any rights under statutes other than the Civil Rights Act of 1964, the same are barred by res judicata between the plaintiff and the defendants in this cause. That in a suit heretofore pending in the United States District Court for the Western District of Tennessee, Western Division, in which Willie Johnson, Jr., was plaintiff, and REA Express, Inc. and the other named defendants herein were defendants, Cause No. C-71-66, suit was brought under the Civil Rights Act of 1964 and 42 U.S.C. Sec. 1981, 1982 and 1983. Also, it was alleged in the above mentioned complaint that plaintiff was denied the opportunity to obtain supervisory training which the defendant REA Express, Inc. provided white employees.

* Effective June 1, 1970, defendant's corporate name was changed to REA Express, Inc.

That Cause No. C-71-66 was by this Court consolidated with Cause No. C-71-2 by the Court.

In the consolidated cause, it was, among other things adjudged and decreed by this Court that through the Honorable Chief Judge Bailey Brown in ruling upon a motion of summary judgment by all defendants, that

> "In so far as plaintiffs in both cases sue under Civil Rights Statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing these claims, that therefore the Tennessee Statute of limitations of one (1) year would apply, and both of these claims were barred by such statute at the time they were filed."

The Court then further decided with regard to the claim concerning supervisory training:

> "4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiff's supervisory training are granted on the grounds that from the undisputed facts plaintiffs have not shown any discrimination in this respect."

The above mentioned judgment stands unreversed and unmodified and in full force and effect, and the matters and things above set forth which were determined, adjudged and decreed in that judgment were and are res judicata between the plaintiff and the defendants in this cause.

3. The Court lacks jurisdiction of the subject matter of the complaint by reason of the fact that this action

was not brought within thirty days after plaintiff was notified of his right to sue as required by Section 706 (e) of the Civil Rights Act of 1964, nor was this action brought within thirty days of the dismissal without prejudice of plaintiff's previously filed suit in Cause No. C-71-66, which cause was dismissed without prejudice on the 16th day of February, 1972. That the instant suit was not filed until May 31, 1972, in excess of 100 days after the dismissal of previous suit. That there is no applicable tolling provision or saving statute which would allow the refiling of this suit in such an untimely manner.

4. REA Express, Inc. admits the allegations contained in Paragraph 1 of the complaint.

5. REA Express, Inc. admits the allegations contained in Paragraph II of the complaint as to the nature of the proceeding, but denies that it is guilty of any acts which would entitle plaintiff to the relief sought.

6. REA Express, Inc. admits the allegations contained in Paragraph III of the complaint.

7. REA Express, Inc., is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the complaint.

8. REA Express, Inc. denies each and every allegation of Paragraph V of the complaint except that plaintiff was employed by REA Express, Inc. which it admits. REA Express, Inc. relies upon its defense of res judicata as set forth in Paragraph 2 of this its answer, with regard to the allegations of Paragraph V concerning supervisory training.

9. REA Express, Inc. is without knowledge or information sufficient to form a belief of the allegations of Paragraph VI of the complaint.

10. REA Express, Inc. admits the allegations of Paragraph VII of the complaint, except that it denies the validity of the findings of the EEOC investigator.

11. REA Express, Inc. admits the allegations of paragraph VIII (A) to the extent that they allege that on or about January 15, 1971, plaintiff received a "notice of right to sue" letter from the EEOC. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph VIII (A) of the complaint.

12. REA Express, Inc. admits the allegations of paragraph VIII (B) of the Complaint to the extent that they allege that on February 12, 1971, a notice of right to sue was filed and treated as a complaint on paupers oath and docketed as case No. C-71-66. REA Express, Inc. further admits that on March 18, 1971, a "supplemental complaint" was filed on plaintiff's behalf by his Court appointed attorney and that answers were filed by the defendants in that suit. REA Express, Inc. admits the remaining allegations of paragraph VIII (B).

13. REA Express, Inc. admits the allegations of paragraph VIII (C) of the complaint.

14. REA Express, Inc. admits the allegations of paragraph VIII (D) and VIII (E) of the complaint.

15. REA Express, nc. admits with regard to the allegations of paragraph VIII (F) of the complaint that settlement of this case was discussed with adverse counsel, but

that no settlement was reached. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the details of plaintiff's refusal to accept any settlement offer or the attitude of his attorney. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the reasons for plaintiff's attorney's withdrawal from the case other than those reasons set forth in his motion to withdraw which is a part of the record in Cause C-71-66.

16. REA Express, Inc. admits the allegations of paragraph VIII (G) of the complaint.

17. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the allegations of paragraph VIII (H) of the complaint concerning plaintiff's efforts to obtain representation or the diligence of counsel's efforts to obtain representation for the plaintiff. REA Express, Inc. admits that letters were written to the Court concerning Cause No. C-71-66 on February 17, 1972 and on May 5, 1972.

18. REA Express, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Article IX of the complaint.

19. REA Express, Inc. admits the allegations of paragraph X of the complaint except that it denies that the plaintiff has suffered or is suffering irreparable injury or any form of injury as a result of its actions.

20. REA Express, Inc. denies the allegations of paragraph XI of the complaint.

All other allegations of the complaint which have not heretofore been admitted or denied or otherwise explained, are hereby denied.

Now, having fully answered, defendant, REA Express, Inc., prays judgment in its favor together with its costs.

.....

Burch, Porter & Johnson,
Attorneys for Defendant
REA Express, Inc.
130 North Court
Memphis, Tennessee

Motion of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the Alternative to Grant Said Defendants Summary Judgment

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Now come the defendants Brotherhood of Railway, Airline and Steamship Clerks Tri-State Local and Lily of the Valley Local (BRAC Locals) to move this Court to dismiss the complaint in the above-entitled case, or in the alternative to grant said defendants summary judgment on the grounds that the Court's Order of June 14, 1971, in the case of Willie Johnson, Jr. v. REA Express, Inc., Brotherhood of Railway Clerks Tri-State Local and Lily of the Valley Local (Civil Action No. C-71-66), (1) granting the BRAC Locals summary judgment on the complaint based on Title VII of the Civil Rights Act of 1964 on the grounds that the undisputed facts showed that plaintiff Johnson had no grounds for relief against the BRAC Locals under that statute and (2) granting the motion of the BRAC Locals to dismiss the claims of the plaintiff under civil rights statutes other than Title VII of the Civil Rights Act of 1964, on the grounds that such claims were barred by the Tennessee State of Limitations, is *res*

judicata with respect to the claims asserted in the present complaint and that the claims in the present complaint are barred by the Court's Order of June 14, 1971, which is final and binding with respect to such claims. This motion is based upon the complaint in the present case and the record in the prior case identified as C-71-66. There is attached to the present motion the pertinent documents from the prior case and a memorandum of points and authorities in support of this motion.

Respectfully submitted,

/s/ JAMES L. HIGHSAW
James L. Highsaw
1015 18th Street, N.W.
Washington, D.C. 20036

/s/ GEORGE E. MORROW
George E. Morrow
750 Union Planters National Bank Bldg.
Memphis, Tennessee 38103

Attorneys for Defendants BRAC Locals

Of Counsel:

HIGHSAW & MAHONEY
1015 18th Street, N.W.
Washington, D.C. 20036

MARTIN, TATE, MORROW & MARSTON, P.C.
705 Union Planters National Bank Bldg.
Memphis, Tennessee 38103

July 25, 1972

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-71-66

Filed, March 18, 1973,

District Court, Western District of Tennessee

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

SUPPLEMENTAL COMPLAINT

I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1343 (4) and 42 U.S.C. Section 2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and 42 U.S.C. Sections 1981, 1982, 1983 and 1988. The jurisdiction of this court is invoked to secure protection of and to redress the deprivation of rights secured by (a) Title VII of the Act known as the Civil Rights Act of 1964, 42 U.S.C. Sections

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

2000e, et seq., providing for injunctive and other relief against racial discrimination in employment, and (b) 42 U.S.C. Sections 1981, 1982 and 1983, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

II.

This is a proceeding for preliminary and permanent injunction restraining defendants from maintaining a policy, practice, custom or usage of withholding, denying or attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with the rights of plaintiff and other Negro persons similarly situated to equal employment opportunities at Railway Express Agency, Inc., Memphis, Tennessee, and equal labor representation by Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, without discrimination on grounds of race or color.

III.

Plaintiff is a Negro citizen of the United States, residing in the State of Tennessee. The defendant, Railway Express Agency, Inc. is a corporation doing business in the State of Tennessee, and City of Memphis, and is an employer within the meaning of 42 U.S.C. Section 2000e(b) in that it is engaged in industry affecting interstate commerce and employs more than twenty-five (25) persons.

IV.

Defendant, Brotherhood of Railway Clerks Lily of the Valley Local is an unincorporated association of produc-

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

tion workers employed at defendant, Railway Express Agency, Inc., and defendant, Brotherhood of Railway Clerks Tri-State Local is an unincorporated association of workers employed at defendant, Railway Express Agency, Inc. On behalf of its members, defendant Unions enter into collective bargaining agreements dealing with the terms and conditions of employment of persons employed at defendant, Railway Express Agency, Inc., in Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Tri-State Local is 331 Radford Road, Memphis, Tennessee. The principal office of the Brotherhood of Railway Clerks Lily of the Valley Local is 1274 Effie Road, Memphis, Tennessee. The Unions are a labor organization within the meaning of 42 U.S.C. Section 2000e(d), and is engaged in industry affecting commerce within the meaning of 42 U.S.C. Section 2000(e).

V.

Plaintiff alleges that he was employed by Railway Express Agency, Inc. from the spring of 1964 until the spring of 1967. Plaintiff alleges that Railway Express Agency, Inc. follows a policy and practice of racial discrimination in that:

(1) Railway Express Agency, Inc. denies Negro employees equal promotion opportunities with white employees;

(2) Railway Express Agency, Inc., in conjunction with defendant Unions, assigns, reassigns, promotes and otherwise acts or fails to act in such a manner as to maintain a preexisting pattern of racial discrimination in employment.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

Plaintiff further alleges that he was denied the opportunity to obtain supervisory training and promotion which the defendant Railway Express Agency, Inc. provides white employees.

VI.

Plaintiff alleges that he was a member of the Brotherhood of Railway Clerks Lily of the Valley Local, one of the defendant unions, and that he was denied membership in the Brotherhood of Railway Clerks Tri-State Local. Plaintiff alleges that the unions followed a policy, custom or practice of racial discrimination in that the unions fail to defend the rights of Negro members in the same manner it defends the rights of white members. Plaintiff further alleges that he was denied equal labor representation because of his race and that his termination of employment was occasioned by racial discrimination practices by defendant, Railway Express Agency, Inc.

VII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission alleging the discriminatory practices set forth herein. On the 18th day of January, 1971, a commission investigator recommended that the commission find reasonable cause to believe that defendant, Railway Express Agency, Inc., had discriminated against plaintiff in that the defendants had violated rights of the plaintiff guaranteed under Title VII of the Civil Rights Act of 1964 by failing to grant plaintiff opportunity for equal employment advancement and by failing to represent plaintiff in the same manner as it represents caucasian employees.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

VIII.

Plaintiff filed timely charges with the Equal Employment Opportunity Commission alleging the discriminatory practices set forth herein. On January 18, 1971, a commission investigator recommended that the commission find reasonable cause to believe that the defendant unions and defendant Railway Express Agency, Inc. had discriminated against the plaintiff in the same manner as set forth in Paragraph VII.

IX.

Neither the State of Tennessee nor the City of Memphis has a law prohibiting the unlawful employment practices alleged herein.

X.

Plaintiff was notified by the commission that pursuant to Section 706(e) of the Civil Rights Act of 1964, he had thirty (30) days in which to institute a civil action in the appropriate United States District Court. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policy, custom, practice and usage as set forth herein.

XI.

Plaintiff alleges that he has no adequate and complete remedy at law to redress the wrongs alleged herein other than this suit for a permanent injunction. Plaintiff is now suffering and will continue to suffer irreparable injury from the defendants' policy, practice, custom and usage as set forth herein.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

XII.

WHEREFORE, plaintiff prays that this court advance this case on the docket, ordering a speedy hearing at the earliest practicable date and cause this case to be in every way expedited and upon such hearing:

(1) Grant plaintiff preliminary and permanent injunction enjoining the defendants, Railway Express Agency, Inc., Brotherhood of Railway Clerks Tri-State Local, and Brotherhood of Railway Clerks Lily of the Valley Local, their agents, successors, employees, attorneys and those acting in concert with them at their direction from continuing and maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiffs as provided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

(2) Grant the plaintiff preliminary and permanent injunction enjoining the defendants, Railway Express Agency, Inc., Brotherhood of Railway Clerks Tri-State Local, and Brotherhood of Railway Clerks Lily of the Valley Local, their agents, successors, employees, attorneys and those acting in concert with them at their direction from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering, individually and/or jointly, with the rights of the plaintiff to enjoy equal employment for advancement or training as directed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq.

Appendix A
(To Motion of Defendants Tri-State Local, etc.)

(3) Grant the plaintiff judgment in the amount of back pay to which he would have been entitled including all raises, bonuses and fringe benefits to which he would have been entitled had the employment not been terminated.

(4) Award plaintiff the costs of this action, together with reasonable attorney's fees as provided in Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e(5)(k).

(5) Plaintiff prays that this court grant such other, futrher, additional and/or alternative relief as the needs of justice require.

Respectfully submitted,

.....

Robert E. Rose
Matthews, Thompson & Rose
745 Commerce Title Building
Memphis, Tennessee
Attorney for Plaintiff

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
No. C-71-66

[Title omitted in printing]

ANSWER OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO SUPPLEMENTAL COMPLAINT

Now come the Tri-State Local and the Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC Locals) to answer the supplemental complaint in the above-entitled cause as follows:

FIRST DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint with respect to the defendants BRAC Locals insofar as the supplemental complaint purports to be based upon Civil Rights Act of 1964 for the following reasons:

1. The defendants BRAC Locals were never served with any charges against such defendants filed with the Federal Equal Employment Opportunity Commission, as required by Section 706(a) of the Civil Rights Act of 1964.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

2. Prior to the institution of this suit, there was no real endeavor by the Federal Equal Employment Opportunity Commission to conciliate with the defendants BRAC Locals the matter complained of as required by the Civil Rights Act of 1964.

SECOND DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint insofar as that complaint is based upon Federal statutory provisions other than the Civil Rights Act of 1964 in that such provisions are not applicable to the subject matter of the supplemental complaint and the plaintiff has not exhausted his internal union remedies within BRAC as a condition precedent to his suit as required by Federal law. In addition, the matter in controversy does not exceed the sum or value of $10,000.00, exclusive of interest and costs, as required by Title 28, Section 1331, of the United States Code.

THIRD DEFENSE

The Court does not have jurisdiction of the claims set forth in the supplemental complaint insofar as such jurisdiction is based upon Federal statutes other than the Civil Rights Act of 1964 because exclusive jurisdiction over such claims rests with the National Railroad Adjustment Board pursuant to Section 3 of the Railway Labor Act, as amended (45 U.S.C.A., Section 153).

FOURTH DEFENSE

Insofar as the supplemental complaint seeks to assert a cause of action based upon Federal statutes other than the Civil Rights Act of 1964, such actions are barred by

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

applicable statutes of limitations including, but not limited to, Tennessee Code Annotated, Title 28, Section 304, and Title 28, Section 305.

FIFTH DEFENSE

The supplemental complaint fails to state a claim upon which relief can be granted against defendants BRAC Locals.

SIXTH DEFENSE

The Court lacks jurisdiction of the subject matter of the supplemental complaint by reason of the fact that this action was not brought within 30 days after plaintiff was notified of his right to sue as required by Section 706(e) of the Civil Rights Act of 1964.

SEVENTH DEFENSE

The Court lacks jurisdiction to grant the relief prayed for by the plaintiff by reason of the provisions of Section 706(g) of the Civil Rights Act of 1964.

EIGHTH DEFENSE

The defendants BRAC Locals admit or deny the allegations of the supplemental complaint as follows:

1. The BRAC Locals deny the allegations of paragraph I of the supplemental complaint.

2. The BRAC Locals deny the allegations of paragraph II of the supplemental complaint.

3. The BRAC Locals admit the allegations of paragraph III of the supplemental complaint.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

4. The BRAC Locals admit that they are unincorporated associations who have members employed by Railway Express Agency and that they have offices in Memphis, Tennessee. Except to the extent thus specifically admitted, the BRAC Locals deny the allegations of paragraph IV of the supplemental complaint.

5. The BRAC Locals state that they are without knowledge sufficient to admit or deny the averments of paragraph V of the supplemental complaint with respect to plaintiff's alleged employment with Railway Express Agency. The BRAC Locals deny all of the remaining allegations of paragraph V of the supplemental complaint.

6. The BRAC Locals deny the allegations of paragraph VI of the supplemental complaint.

7. The BRAC Locals deny the allegations of paragraph VII of the supplemental complaint.

8. The BRAC Locals deny the allegations of paragraph VIII of the supplemental complaint.

9. Paragraph IX of the supplemental complaint constitutes a legal conclusion to which the BRAC Locals are not required to plead.

10. The BRAC Locals state that they are without knowledge sufficient to admit or deny the averments of paragraph X of the supplemental complaint and therefore deny such allegations.

11. The BRAC Locals deny the allegations of paragraph XI of the supplemental complaint.

Appendix B
(To Motion of Defendants Tri-State Local, etc.)

WHEREFORE, the BRAC Locals pray as follows:

1. That the Court dismiss the supplemental complaint or grant the defendants BRAC Locals judgment with respect thereto.

2. That the Court award defendants costs of this action together with reasonable attorney's fee.

3. That the Court grant defendants BRAC Locals such other, further, additional and/or alternative relief as may be appropriate in the premises.

/s/ JAMES L. HIGHSAW
James L. Highsaw
Highsaw & Mahoney
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

/s/ GEORGE MORROW
George Morrow
Martin, Tate and Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendant BRAC Tri-State Local and Lily of the Valley Local

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illnois 60018

April 4, 1971

Appendix C
(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-71-66

[Title omitted in printing]

MOTION OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO DISMISS THE SUPPLEMENTAL COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Now come the defendants in the above-entitled case, Tri-State Local of the Brotherhood of Railway and Airline Clerks and Lily of the Valley Local of said Brotherhood (BRAC Locals), to move the Court to dismiss the supplemental complaint upon the ground that the Court does not have jurisdiction of the subject matter of the complaint. Insofar as the jurisdiction of the complaint is based upon Federal statutes other than the Civil Rights Act of 1964, the motion is based upon the additional ground that the supplemental complaint is barred by the applicable Tennessee Statutes of Limitations; failure of the plaintiff to utilize administrative and union remedies as a condition precedent to a suit based on such statutes; and the fact that plaintiff has no independent cause of action under such other statutes.

Appendix C
(To Motion of Defendants Tri-State Local, etc.)

There are attached hereto in support of this motion an affidavit of Mr. William J. Donlon, General Counsel of the Brotherhood of Railway and Airline Clerks, and a legal memorandum of points and authorities.

Respectfully submitted,

James L. Highsaw
Highsaw & Mahoney
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

George Morrow
Martin, Tate & Morrow
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendants BRAC Tri-State Local and Lily of the Valley Local

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illinois 60018

April 30, 1971

Affidavit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
CIVIL ACTION No. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendant.

STATE OF ILLINOIS,
COUNTY OF COOK, *ss.:*

William J. Donlon, being duly sworn deposes and says as follows:

1. That he is General Counsel of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as BRAC); that his office is in the Headquarters of BRAC located in the O'Hare International Transportation Center at 6300 River Road, Rosemont, Illinois.

2. That he appeared as Counsel of record in proceedings instituted by Willie Johnson, Jr., against REA Express,

Inc., and Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, before the Equal Employment Opportunity Commission, designated case No. 7-6-822EU.

3. That on January 19, 1971 Affiant received notice that Willie Johnson, Jr., had made written demand and the Equal Employment Opportunity Commission had issued pursuant to Section 706(e) of Title 7 of the Civil Rights Act of 1964 and the Equal Employment Opportunity Commission's Procedural Regulations Section 1601.25 and 1601.25a(b), a notice of Charging Parties' right to initiate suit in the appropriate Federal District Court. Copy of Mr. Charles A. Dixon's letter of January 15, 1971 is attached and designated as Exhibit "A". Copy of Notice of Right to Sue sent to Mr. Johnson, dated January 15, 1971, is attached and designated as Exhibit "B".

4. Affiant requested further information from Equal Employment Opportunity Commission relative to date on which Mr. Willie Johnson, Jr. received his Notice dated January 18, 1971 of his right to initiate a suit. Affiant was advised by Mr. Charles A. Dixon, Deputy Director, in a letter dated March 2, 1971, that Mr. Willie Johnson, Jr. received his notice January 18, 1971. Copy of Mr. Dixon's letter is attached hereto and marked as Exhibit "C".

5. Affiant further states that he has read copy of complaint filed by Willie Johnson, Jr. in the above captioned case which indicates court filing on March 18, 1971 and is of the opinion and belief that said action was not com-

Affidavit

menced within the thirty day period prescribed by the statute.

/s/ William J. Donlon

Subscribed and sworn to before me
this 2nd day of April, 1971.

/s/ Helen M. Wright
Helen M. Wright
Notary Public, Cook County, Illinois
My Commission expired March 9, 1974

Appendix D

(To Motion of Defendants Tri-State Local, etc.)

In the United States District Court
For the Western District of Tennessee
Western Division
Civil Action No. C-71-66

[Title omitted in printing]

Interrogatories No. 1 of Defendants
Tri-State Local and Lily of the Valley
Local of the Brotherhood of Railway
and Airline Clerks to Plaintiff
Willie Johnson, Jr.

Now come the defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC Locals) and request the plaintiff Willie Johnson, Jr., pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure, to answer the following interrogatories fully in writing, under oath, and, except where otherwise indicated, separately with respect to each such defendant, and to serve a copy of the answers upon the undersigned counsel for said defendants within fifteen (15) days after service hereof.

These interrogatories shall be deemed continuing and supplemental answers shall be required as plaintiff, directly or indirectly, obtains further information sought herein between the time answers are served to these interrogatories and the time of trial.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

1. State the specific date on which the plaintiff began work for Railway Express Agency, Inc., as alleged in paragraph V of the supplemental complaint.

2. State the job or position held by plaintiff when he began work with Railway Express Agency, Inc., as alleged in paragraph V of the supplemental complaint.

3. State specifically the occasion or occasions upon which the defendant unions failed to defend the rights of negro members in the same manner they defended the rights of white members as alleged in paragraph VI giving the date of each occasion and the names of the members involved.

4. State the particular action or failure to act which constituted a denial to the plaintiff of equal representation because of his rights, as alleged in paragraph VI, including the dates and persons involved.

5. State whether the termination of plaintiff's employment with Railway Express Agency, Inc. was voluntary on his part or was the result of a discharge by his employer if alleged in paragraph VI.

6. If plaintiff was discharged from employment with Rialway Express Agency, Inc., then state the date of termination, whether the termination was done orally or in writing, if the latter the date of the communication and the name of the person who signed same.

7. Does plaintiff have knowledge of any by-law or other rule or regulation of the defendant Lily of the Valley Local limiting the membership of that local to Negroes?

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

8. If the answer to question no. 7 above is in the affirmative, set forth specifically the by-law or rule to which plaintiff refers.

9. Does plaintiff have knowledge of any by-law or rule of defendant Tri-State Local limiting the membership of that local to white persons?

10. If the answer to question no. 9 above is in the affirmative, set forth the by-law or rule to which plaintiff refers.

11. Set forth the approximate date upon which plaintiff became a member of the defendant Lily of the Valley Local.

12. Is plaintiff still a member of the Lily of the Valley Local?

13. If the answer to question no. 12 is "No", set forth the date upon which plaintiff ceased to be a member of the Lily of the Valley Local.

14. If plaintiff is no longer a member of the Lily of the Valley Local, did plaintiff resign his membership in such local?

15. Has plaintiff ever appied for membership in any other BRAC Local?

16. If the answer to question no. 15 above is "Yes", furnish the following information:

(a) The name of the BRAC Local to which plaintiff applied for membership.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

(b) The approximate date upon which such application was made.

17. Has palintiff ever filed a complaint with BRAC concerning the alleged segregation of membership of the Lily of the Valley Local?

18. If the answer to question no. 17 above is in the affirmative, furnish the following information:

(a) The approximate date of such complaint.

(b) The individual to whom such complaint was made.

(c) Whether the complaint was made orally or in writing.

19. Furnish the following information with respect to the collective bargaining agreements which the defendants BRAC Locals have allegedly entered into with defendant Railway Express Agency, Inc., as alleged in paragraph IV of the supplemental complaint:

(a) List each such agreement, including the approximate date thereof.

(b) Name the parties to each such agreement.

20. Set forth the names of white employees provided training for supervisory positions with Railway Express as alleged in paragraph V of the supplemental complaint.

21. Did plaintiff ever request Railway Express to provide him with training toward a supervisory position with Railway Express?

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

22. If the answer to question no. 21 above is in the affirmative, furnish the following information:

(a) The name of the person to whom such request was made.

(b) The approximate date upon which such request was made.

(c) Whether such request was made orally or in writing.

(d) What response did plaintiff receive to such request.

(e) Was such response oral or in writing.

(f) The approximate date of such response.

23. Did plaintiff ever file a grievance with the Lily of the Valley Local or with BRAC alleging that he had been improperly denied an opportunity to train toward a supervisory position with Railway Express?

24. If the answer to question no. 23 above is in the affirmative, furnish the following information:

(a) The date upon which such grievance was filed.

(b) With whom such grievance was filed.

(c) Was such grievance oral or in writing.

25. Paragraph VII of the supplemental complaint alleges that plaintiff's rights as a member of the Lily of the Valley Local were not equal to those of white members of

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

BRAC. In connection with this allegation, furnish the following information:

(a) The specific rights as a member of BRAC to to which plaintiff refers in paragraph VII of the supplemental complaint.

(b) The rights of plaintiff with respect to the matters so referred to.

(c) The claimed rights of white members of BRAC with respect to the matters so referred to.

26. Paragraph VI of the supplemental complaint alleges that plaintiff has been denied equal representation because of his race. With respect to this allegation, furnish the following information:

(a) Set forth specifically the matters with respect to which plaintiff refers claiming he has been denied equal representation.

27. Did plaintiff ever file a grievance with the Lily of the Valley Local claiming that he had been denied equal representation because of race?

28. If the answer to question no. 27 above is in the affirmative, furnish the following information:

(a) The date upon which such grievance was filed.

(b) The person with whom such grievance was filed.

(c) Whether such grievance was oral or in writing.

29. State the date upon which plaintiff was notified by the Federal Equal Employment Opportunity Commission

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

that he had 30 days in which to institute a civil action in an appropriate United States District Court as alleged in paragraph X of the supplemental complaint.

30. Has plaintiff been employed by any other employer since the termination of his employment by Railway Express as alleged in paragraph V of the supplemental complaint?

31. If the answer to question no. 30 above is in the affirmative, set forth the following information with respect thereto:

(a) The name of each such employer.

(b) The approximate dates upon which plaintiff was employed by each such employer.

(c) If there has been more than one employer, the positions plaintiff held with each such employer and his approximate compensation with each such employer.

(d) Was plaintiff fired by any such employer. If so, what was the reason given therefor?

32. Furnish the address at which plaintiff resides in the State of Tennessee as alleged in paragraph III of the supplemental complaint.

33. What is plaintiff's age?

34. Set forth plaintiff's education.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

35. Did plaintiff hold a bulletined position with Railway Express?

36. If the answer to question no. 35 is "No", did plaintiff ever file a bid with Railway Express for a bulletined position?

37. If the answer to question no. 35 above is "Yes", furnish the following information:

(a) The job for which plaintiff bid.

(b) The date upon which such bid was filed.

38. Did plaintiff ever appear on a seniority roster of employees of Railway Express?

39. State the specific acts which plaintiff requests the Court to enjoin the defendants BRAC Locals from performing under the prayed for relief contained in paragraph XII(2) of the supplemental complaint.

40. State the specific acts which plaintiff seeks to have the Court enjoin the defendants BRAC Locals from performing in the prayer for relief contained in paragraph XII(p) of the supplemental complaint.

41. State the specific position with Railway Express to which plaintiff claims he should be reinstated as prayed for in paragraph XII(3) of the supplemental complaint.

42. Set forth the amount of back pay which plaintiff claims he should be awarded with respect to this position.

Appendix D
(To Motion of Defendants Tri-State Local, etc.)

43. List the names and addresses of any persons whom plaintiff knows to have any knowledge of any of the matters set forth in the supplemental complaint.

Respectfully submitted,

/s/ James L. Highsaw
James L. Highsaw
Highsaw & Mahoney
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

Of Counsel:

William J. Donlon
6300 River Road
Rosemont, Illinois 60018

/s/ George E. Morrow
George E. Morrow
Martin, Tate, Morrow & Marston, P. C.
Union Planters National Bank Bldg.
Memphis, Tennessee 38103
Attorneys for Defendants BRAC Tri-State Local and Lily of the Valley Local

May 11, 1971

Appendix E

(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

CIVIL ACTION NO. C-71-66

[Title omitted in printing]

ANSWER TO INTERROGATORIES NO. 1 OF DEFENDANTS TRI-STATE LOCAL AND LILY OF THE VALLEY LOCAL OF THE BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS TO PLAINTIFF WILLIE JOHNSON, JR.

1. Plaintiff does not recall exact date he began work for Railway Express Agency, Inc. but states that it was approximately May or June of 1964.

2. Plaintiff began work as a handler.

3. Plaintiff does not know specifically the dates and the names of all persons involved but recalls generally that all Negro employees were referred to Lily of the Valley Local and the Tri-State Local would not represent the Negro employees.

4. Plaintiff states that the Lily of the Valley Local was not even for Railway Express employees in his category but was in fact a union for mail employees.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

5. Plaintiff's employment was the result of a discharge by his employer.

6. Plaintiff does not recall the exact date of termination, he believes the termination was in writing because he had been given a post dated resignation which he executed prior to termination.

7. No.

8. Not applicable.

9. Plaintiff has no knowledge.

10. Plaintiff has no knowledge.

11. Plaintiff joined the union approximately thirty (30) days after being hired by Railway Express.

12. No.

13. Plaintiff does not recall date.

14. No.

15. No.

16. Not applicable.

17. No formal complaint was ever filed before filling suit.

18. Not applicable.

19. Plaintiff has no personal knowledge.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

20. Plaintiff has no knowledge.

21. No.

22. Not applicable.

23. Plaintiff has filed no formal grievance.

24. Not applicable.

25. Plaintiff states that the dues were higher for the Negro employees in the Lily of the Valley Local than the dues were for the white employees in the Tri-State Local. Plaintiff further generally alleges that as a Negro employee the unions were not giving proper and diligent representations to their grievances.

26. Answer same as No. 25.

27. Plaintiff did not file a formal grievance.

28. Not applicable.

29. Plaintiff does not recall the exact date he received notice from the Federal Equal Employment Opportunity Commission but the date of notice for thirty (30) days in which to institute a civil action was January 15, 1971.

30. Yes.

31. Plaintiff has been employed by Kroger, Inc. since April of 1968 and prior to April of 1968 he had numerous part time jobs and is unable to recall the exact dates or names of employers for that period of time. Plaintiff is

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

employed as an order puller with Kroger at the present time. Plaintiff has not been fired by any employer since leaving employment of the Railway Express Agency.

32. Plaintiff lives at 4325 Loral Cove.

33. Plaintiff's age is 33.

34. Plaintiff has completed high school education.

35. Yes.

36. Not applicable.

37. a) Driver.

b) Bid for one year on the above job before obtaining same.

38. Yes.

39. Plaintiff requests the Court to enjoin the defendants BRAC Locals from continuing the practice of discrimination in dues charged Negro and white employees; in failing to give grievances of Negro employees proper and diligent consideration; and failing to give Negro employees equal opportunity for advancement to supervisory positions.

41. Supervisor.

42. Plaintiff is unable to answer as he is not aware of any raises which may have been awarded since his termination with Railway Express or what the present rate of pay is for employees of Railway Express.

Appendix E
(To Motion of Defendants Tri-State Local, etc.)

43. Plaintiff does not at this time recall the names and addresses of persons who have any knowledge of the matter set forth in the supplemental complaint other than the name of Thomas Thornton.

Respectfully submitted,

Robert E. Rose
Attorney for plaintiff,
Willie Johnson, Jr.

Appendix G

(To Motion of Defendants Tri-State Local, etc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
Filed June 14, 1971

CIVIL C-71-2

THOMAS THORNTON,
Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,
Defendants,

—AND—

CIVIL C-71-66

WILLIE JOHNSON, JR.,
Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,
Defendants.

Appendix G
(To Motion of Defendants Tri-State Local, etc.)

ORDER WITH RESPECT TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Upon consideration, and after argument of counsel, it is hereby ORDERED:

1. Insofar as plaintiffs in both cases sue under Civil Rights statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing those claims, that therefore the Tennessee statute of limitations of one year would apply, and both of these claims were barred by such statute at the time they were filed.

2. The motions to dismiss in both cases on the ground that the thirty-day letter filed within the thirty-day period is not sufficient to satisfy the requirement that a complaint be filed within thirty days following the issuance of said letter are overruled. See opinion of Judge Harry W. Wellford, *Joeanna Beckum* v. *Tennessee Hotel*, (W.D. Tenn. 1971) attached hereto. Cf. *Rice* v. *Chrysler Corp.*, —— F.Supp. ——, 3 FEP Cases 436 (E.D. Mich. 1971).

3. The motion of the defendant Union locals for summary judgment will be granted on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964.

4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiffs supervisory training are granted on the ground that from the undisputed facts plaintiffs have not shown any discrimination in this respect.

Appendix G
(To Motion of Defendants Tri-State Local, etc.)

5. The motions of REA Express, Inc. for summary judgment with respect to the claim of both plaintiffs of discriminatory discharge and with respect to plaintiff Johnson's claim of denial of equal promotional opportunities and discrimination in job assignment be and the same are hereby denied.

ENTER this 14th day of June, 1971.

BAILEY BROWN
Chief Judge

(Illegible)

Motion of the Defendant Rea Express, Inc. to Dismiss the Complaint or in the Alternative to Grant Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Comes now the defendant, REA Express, Inc. and moves this Court to dismiss the Complaint in the above entitled cause, or in the alternative to grant said defendant summary judgment on the following grounds:

(1) That the Court lacks jurisdiction of the subject matter of the Complaint by reason of the fact that this action was not brought within 30 days after plaintiff was notified of his right to sue as required by Section 706(e) of the Civil Rights Act of 1964, nor was this action brought within thirty (30) days of the dismissal without prejudice of plaintiff's previously filed suit in Cause No. C-71-66, which cause was dismissed without prejudice on the 15th day of February, 1972. That the instant suit was not filed until May 31, 1972, in excess of 100 days after the dismissal of the previous suit. That there is no applicable tolling provision or saving statute which would allow the re-filing of this suit in such an untimely manner, and that this suit is barred by the limitation provided in the enabling Act.

(2) That your defendant is entitled to a summary judgment as to any claims of the plaintiff under Civil Rights

Statutes other than Title VII of the Civil Rights Act of 1964, and as to claims made under the allegations of paragraph V of the Complaint herein on the ground that such matters were decided by the United States District Court for the Western District of Tennessee, Western Division in Cause No. C-71-66 in a manner adverse to the plaintiff by order of the Court on June 14, 1971, and such matters are res adjudicata.

This motion is based upon the Complaint in the present cause, upon the motion of the defendants' Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lilly of the Valley Local in Cause No. C-72-183, and all documents of record in Cause No. C-71-66.

Respectfully submitted,

BURCH, PORTER & JOHNSON

/s/ By SAUL C. BELZ
Saul C. Belz

Amendment to Motion of Defendants Tri-State Local and Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks to Dismiss the Complaint or in the Alternative to Grant Said Defendants Summary Judgment

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

[Title omitted in printing]

Come now the defendants Brotherhood of Railway, Airline and Steamship Clerks Tri-State Local and Lily of the Valley Local (BRAC Locals) and amend the Motion heretofore filed in this cause on July 25, 1972 for the dismissal of the Complaint or for the granting of a Summary Judgment, as follows:

These defendants adopt and reiterate the grounds for dismissal of the Complaint or the granting of a Summary Judgment set forth in the Motion of the defendant REA Express, Inc., setting forth the absence of jurisdiction over the subject matter of the Complaint in this Court, by reason of the failure of the plaintiff to bring his action within the time provided in the governing statutes.

For said reason, in addition to those set forth in their earlier motion, these defendants pray that the cause be

dismissed as to them, or that the Court grant a Summary Judgment to these defendants.

Respectfully submitted,

James L. Highsaw
1015 18th Street N. W.
Washington, D. C. 20036

George E. Morrow
705 Union Planters National Bank Building
Memphis, Tennessee 38103

Attorneys for Defendants BRAC Locals

Of Counsel:

HIGHSAW & MAHONEY
1015 18th Street N. W.
Washington, D. C. 20036

MARTIN, TATE, MORROW & MARSTON, P.C.
705 Union Planters National Bank Bldg.
Memphis, Tennessee 38103

September 6, 1972

Order on Defendant Motions for Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-72-183

Filed, January 25, 1973, Clerk, U.S. District Court,

Western District of Tennessee

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL, and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

This is an action brought by a former employee of Railway Express Agency, Inc. (REA) against that carrier and two local lodges of the BRAC, i.e., the Tri-State Local and the Lily of the Valley Local (BRAC Locals) alleging violations of the civil rights of the plaintiff under federal statute. Jurisdiction is asserted pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Section 2000e, et seq.), the provisions of other federal statutes protecting civil rights set forth in 42 U.S.S.C., Sections 1981, 1982 and 1988, and the provisions of Title 28 of the United States Code, Section 1343. The complaint asks for injunctive relief, compensatory damages, and

the award of costs of the action together with reasonable attorneys' fees.

Paragraph VIII of the present complaint states that "this is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested herein." Said paragraph VIII then goes on to recite the following facts with respect to the prior complaint:

> "On February 12, 1971, this Court entered orders appointing Robert E. Rose as attorney for plaintiff and allowing plaintiff's 'Notice of Right to Sue' Letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a 'Supplemental Complaint' was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendants Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever filed on behalf of plaintiff in opposition to defendants' motions.
>
> On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other

than Title VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA 'with respect to the claim of dismissal for not giving plaintiffs supervisory training', (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the 'Notice of Right to Sue' letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants)."

The complaint, with respect to prior history of this dispute, also sets out in substance that plaintiff's appointed counsel, Mr. Rose, failed to take discovery and to prepare the case for trial, and being dissatisfied with plaintiff's cause of action and his refusal to settle, was permitted by Judge Brown to withdraw as counsel (purportedly without notice to plaintiff) within a few weeks before the date fixed for trial. Plaintiff further asserts and the record bears out in the prior action that Judge Brown directed the Court Clerk to notify plaintiff that if he did not obtain another counsel within 30 days his claim would be dismissed without prejudice.

Plaintiff's present counsel after being contacted (for the second time) by plaintiff within the prescribed 30 day period wrote to Judge Brown within a day or two *after* this period had elapsed, requesting an additional 30 days for plaintiff to secure legal representation. The Court

had, however, on the 30th day (February 16, 1972) entered an order dismissing the case *without* prejudice. This action has been subsequently filed on May 31, 1972.

At no time did plaintiff Johnson appeal to the United States Court of Appeals for the Sixth Circuit the order of Judge Brown dated June 14, 1971, granting the BRAC Locals summary judgment with respect to the claims upon Title VII of the Civil Rights Act of 1964 and dismissing plaintiff Johnson's claims based upon other federal statutes.

Plaintiff's Claim Against Defendant Unions

This action clearly involves the same parties and the same subject matter of dispute as were before Judge Brown.[1] Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim again after a final disposition by Judge Brown. *Sopp* v. *Gehrlin*, 236 F.Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree*, 326 F. Supp. 755 (E.D. Pa. 1971); *Vassos* v. *Societa Trans-Oceania*, 272 F.2d 182 (2nd Cir. 1960), *cert. denied*, *Haldane* v. *Wilhelmina Helen King Chagnon*, 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged poor or improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a "second bite at the apple" after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction. Of course, if Judge Brown had no such jurisdiction of the parties, neither do we. The motion of defendant unions, either for dismissal, or for summary judgment, is granted on grounds of res judicata. Other grounds are discussed hereinafter.

[1] The complaints in both causes are substantially similar.

Order on Defendant Motions for Judgment

Plaintiff's Claim Against REA

1. Plaintiff's claims of violation of his civil rights under 42 U.S.C. 1981 through 1988 were properly dismissed and are here dismissed because barred by the applicable Tennessee one year statute of limitations. *Ellenburg* v. *Shepherd*, 406 F.2d 1331 (6th Cir. 1968) and *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968). In addition, plaintiff's cause of action under these sections would be subordinate to provisions of the Railway Labor Act which governs the defendant employer (and the defendant unions). See also *Oliphant* v. *Brotherhood Firemen, et al.*, 262 F.2d 359 (6th Cir. 1958) *cert. denied*, 359 U.S. 935. No effort was made by plaintiff to protect or assert his rights under the administrative procedures available under that Act. As to all claims of plaintiff other than those asserted under Title VII of the 1964 Civil Rights Act, then, the cause of action is barred under the statute of limitations defense asserted by all defendants and because plaintiff did not pursue his administrative remedy under the Railway Labor Act.

2. Judge Brown's previous order of June 14, 1971, granted defendant REA's motion for summary judgment after a hearing with respect to plaintiff's claim regarding lack of supervisory training "on the ground that from the undisputed facts plaintiff[s] have not shown any discrimination in this respect—" Judge Brown considered the affidavits and evidence before him and dismissed plaintiff's claim in this particular. We hold that Judge Brown's ruling was a final disposition and constitutes res adjudicata as to this aspect of plaintiff's claim.

Order on Defendant Motions for Judgment

3. It is also asserted that plaintiff has failed to comply with jurisdictional requirements of the Equal Employment sections of the Civil Rights Act. Judge Brown ruled that under the then circumstances of the case the "30 day provision" of the act did not bar plaintiff's claim because he relied in part upon the Court for advice as to how to file his claim of unlawful racial discrimination and simply filed his notice or letter from Equal Employment Opportunity Commission giving him the right to sue within the requisite 30 day period. This Court in *Beckum* v. *Tennessee Hotel*, Cause C-70-417, ruled similarly on the same issue on May 6, 1971. In *Beckum, supra*, however, we did not rule as to whether this procedure met minimal requirement of F.R.Civ. P. 8a(2). Further complications ensued in this case after Judge Brown's initial ruling on the 30 day statutory requirement and plaintiff's suit was dismissed without prejudice,[2] February 16, 1972. Plaintiff's counsel wrote Judge Brown again on May 5, 1972,[3] requesting reinstatement of the cause explaining the financial inability of plaintiff, and also seeking vacation of the Court's previous order. This Judge Brown declined to do since the case "has long since been dismissed".[4]

Considering all the circumstances of the matter, we find reluctantly that plaintiff has failed to meet statutory requirements and that his refiling should have taken place within 30 days after Judge Brown's February 16, 1972 order. The Chief Judge extended unusual consideration to plaintiff that would not have been granted ordinary civil

[2] It is noted, however, that notice had been issued to plaintiff that his case would be dismissed if he did not obtain a lawyer by the appointed time.

[3] See Exhibit to complaint.

[4] See Exhibit to complaint.

litigants and we cannot hold under the circumstances that Title VII Civil Rights Act requirements imposed by Congress may be indefinitely extended by the Courts. Defendant REA's motion to dismiss will therefore be granted. *See Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970), *Brady* v. *Bristol-Myers, Inc.*, 332 F.Supp. 995 (E.D. Mo. 1971).

It should also be observed that the Equal Employment Opportunity Commission in this case was perhaps partially at fault in the handling of plaintiff's complaint because of the long 4 year delay involved in processing the complaint before issuance of the right to sue notice. It is regrettable that plaintiff's complaint should be dismissed without a hearing on its merits by reason of the circumstances alluded to in this order.

We, nevertheless, grant all defendants' motions and dismiss the complaint filed herein for the reasons stated, but at the cost, under the circumstances, of REA.

HARRY W. WELLFORD
UNITED STATES DISTRICT JUDGE

Date: 1/24/73

A TRUE COPY.

ATTEST:

W. LLOYD JOHNSON, CLERK

/s/ By A. A. BROWN

Opinion of the United States Court of Appeals for the Sixth Circuit

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION

Decided and Filed November 27, 1973.

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court dismissing plaintiff's complaint which alleged employment discrimination.

Plaintiff-appellant, Willie Johnson, filed timely charges with Equal Employment Opportunity Commission (EEOC) in 1967 in which he alleged that his employer, Railway

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

Express Agency, Inc. (REA), discriminated against him with regard to seniority rules and job assignments. Johnson further asserted that he had been discharged by REA because of his race (black). Johnson also charged the Brotherhood of Railway Clerks Tri-State Local and the Lily of the Valley Local with maintaining segregated Locals.

On December 22, 1967 EEOC filed a report concluding that the company and the unions had engaged in discriminatory practices; however, it was not until January 15, 1971 that Johnson received his notice of right to sue letter from EEOC. Initially Johnson was unable to retain a lawyer to file suit authorized by the letter. On February 12, 1971 District Judge Bailey Brown allowed Johnson to file the EEOC notice-letter with the Clerk as satisfying the duty to institute suit within thirty days from date of receiving notice. Judge Brown further allowed Johnson to proceed *in forma pauperis* and appointed an attorney to represent him. The court-appointed attorney filed an amended complaint on March 18, 1971, setting forth in more detail Johnson's claims.

At this point both defendants moved for summary judgment supported by affidavits. The unions also propounded to plaintiff interrogatories, which he answered. Plaintiff submitted no affidavits in opposition to these motions.

On June 14, 1971 the Court entered an order which—

(1) dismissed all claims based on statutes other than Title VII of the 1964 Civil Rights Act as barred by Tennessee's one-year statute of limitations,

(2) denied the defendants' claims that the filing of the EEOC notice-letter was insufficient to meet the thirty-day filing requirement,

(3) granted the two unions' motions for summary judgment, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act,

(4) granted the motion of REA for summary judgment regarding improper supervisory training, and

(5) denied REA's motion for summary judgment regarding Johnson's claims of discriminatory discharge, denial of promotional opportunities, and discrimination in job assignment.

After this ruling, REA offered Johnson one hundred fifty dollars in settlement of the case; Johnson refused. Subsequently the case was assigned for trial and Johnson's court-appointed attorney, with the Court's permission, withdrew from the case on January 14, 1972. On that date the Clerk of the District Court, acting pursuant to the Court's direction, wrote a letter to Johnson giving him thirty days in which to obtain a new attorney or have his case dismissed without prejudice. Johnson did not obtain a new attorney within such time, and on February 16, 1972 Judge Brown entered an order dismissing the action without prejudice. We need not determine the propriety of this order because it was a final order from which no appeal was taken.

On February 17, 1972 William Caldwell, now one of Johnson's lawyers, wrote to Judge Brown informing him that he, Caldwell, was looking for financial support which would enable him to take Johnson's case. The letter was clearly not an announcement that Caldwell was his counsel; the letter stated only that he might be Johnson's counsel at some point in the future. Later Caldwell found such financial support and did undertake to represent Johnson. On May 31, 1972 a second complaint was filed against REA

and the unions, with Caldwell acting as counsel for Johnson.

All of the defendants moved for dismissal or, in the alternative, for summary judgment. The case was assigned to District Judge Wellford, who ruled on these motions on January 25, 1973. First, the Court dismissed Johnson's claims against the unions on grounds of *res judicata*, holding that the present suit involved the same parties and the same subject matter decided in the first action where summary judgment was granted by Judge Brown. Second, the Court held that Johnson's claims of violation of his civil rights under 42 U.S.C. §§ 1981 through 1988, were barred by Tennessee's one-year statute of limitations. Third, the Court found that Johnson did not pursue properly his administrative remedies under the Railway Labor Act. Fourth, the Court held that *res judicata* barred Johnson's claims against REA on the issue of supervisory training. Fifth, the Court ruled that Johnson's failure to refile a lawsuit within thirty days from February 16, 1972 (the date of dismissal without prejudice) resulted in a failure to comply with the thirty-day filing requirement.

We will deal first with the thirty-day filing requirement since failure to meet it results in a lack of jurisdiction. *Goodman* v. *City Prods. Corp.*, 425 F.2d 702 (6th Cir. 1970).

Johnson contends that he was not required to file suit within thirty days after dismissal without prejudice. He argues that the only statutory requirement is that he file his original suit within thirty days after receipt of his notice-letter. We disagree. We rely on our decision in *Bomer* v. *Ribicoff*, 304 F.2d 427 (6th Cir. 1962), and the decision in *McClendon* v. *North American Rockwell Corp.*,

2 CCH Employment Prac. Dec., Par. 10,243 (C.D. Cal. 1970).

In *Bomer*, plaintiff's request for increased benefits under the Social Security Act was denied on August 4, 1959. He was advised that he could file a civil action within sixty days, challenging this determination, since there was a statutory procedure for such challenge within that time span. He filed such suit on September 30, 1959. On May 5, 1960, on his motion his case was dismissed without prejudice. Plaintiff later refiled his action on May 1, 1961. The Government moved to dismiss, contending that the plaintiff failed to commence suit within sixty days after notice of the final decision on August 4, 1959. The District Judge granted the Government's motion and dismissed the case. In affirming, Judge Shackelford Miller wrote for a unanimous court:

> An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. A. B. Dick Co. v. Marr, 197 F.2d 498, 502, C.A. 2nd; cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; Bryan v. Smith, 174 F.2d 212, 214, C.A. 7th. In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. Humphreys v. United States, 272 F.2d 411, 412, C.A. 9th; Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; DiSabatino v. Mertz, 82 F.Supp. 248, 249-250, M.D.Pa.
>
> The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be

asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. Zeller v. Folsom, 150 F.Supp. 615, 617, N.D.N.Y.; Coy v. Folsom, 228 F.2d 276, 279-280, C.A. 3rd; Ewing v. Risher, 176 F.2d 641, C.A. 10th; Scott v. Railroad Retirement Board, 227 F.2d 684, 686, C.A. 7th. (304 F.2d at 428, 429)

Additionally, in *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968), we held that filing of previous actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year statute of limitations of the Federal Tort Claims Act. 28 U.S.C. § 2401 (b).

McClendon, supra, is the case factually closest to the one at bar. There, plaintiff received a right to sue letter on January 15, 1968, and filed an action on January 19, 1968 which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. Defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

In *McClendon* the District Court noted that the effect of voluntary dismissals without prejudice, absent a savings statute, was to create a situation the same as though the suit had never been brought. The Court stated:

> Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no

> benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective. 2 CCH E. P. Dec. at 974.

Although *Bomer* and *McClendon* are authority for the proposition that the filing of a suit which was dismissed without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued. Here, the claim was already stale before the initial suit was filed. 42 U.S.C. § 2000e-5(e) was meant to eliminate such possibilities.

Any error that was committed was an error in favor of appellant Johnson. He failed to comply even with the District Court's liberal interpretation of the requirement by his failure to file within thirty days after dismissal. The

Title VII claims are thus barred since the Court was without jurisdiction to hear the charges set forth in the new complaint filed on May 31, 1972.

The second question for consideration is whether Johnson's claims under 42 U.S.C. §§ 1981, 1982 and 1983, were time-barred by a Tennessee statute of limitations. Both Judge Brown's first ruling and Judge Wellford's later order found that these claims were time-barred. We agree. It is the duty of Federal Courts to apply the state statute of limitations most analogous to these actions. Appellant agrees with this but differs only as to what is the most analogous statute.

We feel that the most analogous statute is Title 28, Section 304, of the Tennessee Code. It reads as follows:

> *Personal tort actions — Malpractice of attorneys — Civil rights actions — Statutory penalties.* — Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Appellant contends that while this state statute, Section 304, is appropriate for Sections 1983 and 1985 actions, it is not appropriate for § 1981 actions. However, *Snyder* v. *Swann*, 313 F.Supp. 1267 (E.D. Tenn. 1970), held this precise statute applicable to a Section 1981 action.

Appellant further contends that his complaint sounds in contract and is governed by a six-year statute of limitations. In our opinion, the complaint sounds in tort rather than in contract. Moreover, the very language of the state statute refers to "civil actions . . . brought under the federal civil rights statutes." Thus, the tort-contract dichotomy does not have to be resorted to, given the preciseness of the state statute.

Finally on this point, appellant argues that filing of the charges with the EEOC tolls the statute of limitations under 42 U.S.C. § 1981. We reject this claim. In *Williams* v. *Hollins*, 428 F.2d 1221 (6th Cir. 1970), we declined to toll the statute in a section 1983 action during the time when plaintiff was in a Tennessee jail, since Section 301 of Title 28 of the Tennessee Code did not contain any such savings clause. In addition, appellant concedes the Title VII and Section 1981 claims are independent. Thus, no reason exists for stopping the running of a state statute of limitations while a charge is pending before the EEOC.

We have considered other points assigned as error, but in view of our disposition of the case they do not require discussion.

The judgment of the District Court is affirmed.

Order on Petition for Rehearing

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Filed January 15, 1974, James A. Higgins, Clerk

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

---

Before:

WEICK, *Circuit Judge,*
O'SULLIVAN, *Senior Circuit Judge,* and
ALLEN,* *District Judge.*

This cause came on to be heard on the petition for rehearing, with a suggestion that it be heard en banc; and no Judge having requested that a vote be taken on whether said petition should be heard en banc, the petition for rehearing was referred to and was considered and determined by the panel.

The basis of the first part of our opinion was that when a Title VII (1964 Civil Rights Act) action was dismissed without prejudice, the plaintiff against whom the order was

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

entered had thirty days to refile the complaint.[1] Failure to meet this requirement was held to result in a jurisdictional defect.

Appellant's basic argument in his brief supporting the petition for rehearing is that the Tennessee Savings Statute, T.C.A. 28-106, grants an entire year after such dismissal without prejudice to refile in the State Court. Appellant argues that this state statute is applicable because the federal statute involved gives no guidance as to time limitations.

It is clear that in civil rights actions brought under 42 U.S.C. §§ 1981 through 1988, a state statute of limitations is looked to because the federal statute is silent. *Madison v. Wood,* 410 F.2d 564 (6th Cir. 1969). However, Title VII of the 1964 Civil Rights Act is far from silent in regard to a limitations period for actions brought pursuant to the Act. It grants to claimants thirty days from the date of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (hereinafter referred to as EECO) within which to file suit in the Federal District Court.

The state statute of limitations and its savings clause are never reached in this case because the federal statute is not silent. While the language of the federal statute may not cover the situation precisely, it indicates a clear policy that should be looked to before a state statute is embraced.

[1] The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned.

The federal statute provides that claimants have thirty days from receipt of a right-to-sue letter, to file law suits. If they have only thirty days to file initially, it is difficult to see why claimants should have more than thirty days to refile after dismissal without prejudice, particularly when such refiling is ordered by the Court.

The requirement of refiling within thirty days seems ample time. A complaint is easily drawn and filed; indeed, in this case all that need be done is to refile the original complaint. In these cases of alleged employment discrimination, there is no latent injury waiting to be discovered which would justify an extended period of time in which to refile. The complainant already knew what his grievance was, as it had been pending before EEOC for more than three years before he was authorized to file suit in the District Court. There is no reason not to expect expeditious processing of such claims in accord with a thirty-day requirement.

The second basis for our decision was that appellant's civil rights claims under 42 U.S.C. § 1981 were barred by the Tennessee one-year statute of limitations, T.C.A. 28-304. Appellant's employment was terminated in June, 1967, and the complaint was not filed until March 18, 1971. T.C.A. 28-304 applies to "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Appellant appears not to attack the controlling nature of this statute but rather its constitutionality. Appellant argues that the statute is arbitrary since it places the same limitations period on all federal civil rights statutes.

We see nothing about the statute that violates equal protection or due process rights of any individual. T.C.A. 28-304 is not directed solely at civil rights claims, and even

if it were, it would not necessarily be arbitrary in a constitutional sense. The statute applies also to a wide variety of personal tort actions and to claims of malpractice against attorneys.

Appellant relies on *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and suggests that this statute of limitations creates an explicit racial classification. This contention is obviously unfounded because citizens of all races are entitled to take advantage of the federal civil rights statutes.

Finally, appellant argues that the filing of his Title VII claim with the EEOC tolls the state statute regarding his claims under 42 U.S.C. § 1981. In a letter supplementing his brief supporting his petition for reconsideration, appellant cites *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 (D.C.Cir. 1973), in which the Court stated in a footnote (n.30) that the filing of charges with the EEOC tolled the statute of limitations on a Section 1981 action. We decline to adopt this position.

It appears to us that the footnote in *Macklin* v. *Spector*, *supra*, is inconsistent with the rationale in the text of the opinion. *Spector* had argued that since no complaint had been lodged with the EEOC, plaintiff's Section 1981 action had to be dismissed. The Court held, and we think correctly, that no exhaustion of EEOC procedures was necessary to bring a Section 1981 claim, because § 1981 constitutes a cause of action separate and independent from a Title VII claim. The Court said:

> ". . . Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the

> breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F.2d at 996.

If the two actions "differ so widely in their substantive scopes" the filing of one should not toll the statute of limitations on the other. The Court suggested in the relevant footnote that the basic reason for such tolling was a Congressional desire to favor informal means of accommodation provided for under Title VII. We think that there is enough flexibility in the federal trial system so that conciliation processes will not be destroyed if a Section 1981 case is heard while a Title VII claim is being processed. *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D.Del. 1973).

In *Jenkins* the Court also held that no tolling effect on § 1981 claims took place with the filing of Title VII charges with the EEOC. The Court relied heavily on the reasoning in *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Young* held that Title VII claims and § 1981 claims were separate and independent, and that Title VII imposed no jurisdictional barriers to a § 1981 action. We agree with this reasoning and with that included in the text of the opinion in *Macklin* v. *Spector, supra.*

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT.

/s/ JAMES A. HIGGINS
Clerk

Supreme Court U. S.
MAY 1 1 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

WILLIE JOHNSON, JR., Petitioner	
v.	Docket No. 73-1543
RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, Respondents	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

Peter G. Wolfe
Attorney for
REA Express, Inc.
219 E. 42 Street
New York, N. Y.
10017

May 15, 1974

TABLE OF CONTENTS

		PAGE
	Preliminary Statement	1
	Questions Presented	2
	Statutory Provisions Involved	3
	Statement of the Case	5
I	THERE IS NO REAL CONFLICT WITH OTHER COURT OF APPEALS DECISIONS ON ANY IMPORTANT MATTERS	6
II	OTHER ISSUES RAISED BY PETITIONERS DO NOT WARRANT EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY	10
	A. The Interpretation of Tenn. Code §28-304	10
	B. Exhaustion of Administrative Remedies Under the Railway Labor Act	12
	C. Statute of Limitations	15
	D. Res Judicata	20
	CONCLUSION	22

TABLE OF AUTHORITIES

CASES	PAGE
Ackermann v. United States, 340 U.S. 173(1950)	19
Andrews v. Louisville & Nashville R. Co., 406 U.S. 320(1972)	12,15
Boudreaux v. Baton Rouge Marine Contracting Company, 437 F. 2d 1011(5th Cir. 1971)	7
Build of Buffalo, Inc. v. Sedita, 441 F. 2d 284 (2d Cir. 1971)	22
Gates v. Georgia-Pacific Corp., 7 CCH EPD ¶9185 (9th Cir. 1974)	16
Glenmore v. Ahern, 276 F. 2d 525 (2d Cir. 1959), cert den., Tri-Continental Financial Corp. v. Glenmore, 362 U.S. 964 (1960)	21
Glover v. St. Louis & San Francisco R. Co., 393 U.S. 324 (1969)	12,13,14
Huddleston v. Dwyer, 322 U.S. 232 (1944)	11
Klaprott v. United States, 335 U.S. 601(1949)	18,20
Macklin v. Spector Freight Systems, Inc., 478 F. 2d 979 (D.C. Cir. 1973)	6,7,9,14
Steele v. Louisville & Nashville Railroad Company, 323 U.S. 192(1944)	12,13,14

TABLE OF AUTHORITIES

STATUTES	PAGE
Civil Rights Act of 1866, 42 U.S.C. §1981	6,7,8,9,12 13,14,15
Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.	2,7,8,9,14
Judicial Code, 28 U.S.C. §1292(a)(1)	3,21
Railway Labor Act, 45 U.S.C. §151 et seq.	4,12,13,14 15
Tennessee Code, §28-304	10
Federal Rules of Civil Procedure Rule 54(b)	21
Rule 60(b)	3,15,18,19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

WILLIE JOHNSON, JR., Petitioner v. RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, Respondents	Docket No. 73-1543

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT REA EXPRESS, INC. IN OPPOSITION TO CERTIORARI

Preliminary Statement

The opinions of the Court below are set forth in Petitioner's Appendix. References to such Appendix are cited with the suffix "a." Petitioner is referred to herein as

"Johnson" and Respondent REA Express, Inc. as "REA."

Questions Presented

REA will rely on Johnson's Questions Presented except for Questions 2b and 2c, for which it substitutes the following Questions:

2. Whether a person who claims that he has been discriminated against in employment on account of his race should be denied a hearing on the merits on any of the following grounds:

(b) As to his cause of action under Title VII, a suit dismissed without prejudice for failure to obtain counsel must be refiled within 30 days of the order of dismissal and the order need not be reopened, in the discretion of

the District Judge, under Rule 60(b), F. R. Civ. P.; and

(c) As to his causes of action under either statute, an order granting motions for summary judgment in an action seeking injunctive relief which was subsequently dismissed without prejudice for failure to obtain counsel has res judicata effect.

Statutory Provisions Involved

In addition to the statutes cited, the following statutes are also involved in this case:

1. United States Code, Title 28, Section 1292(a)(1)provides:

> "The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District court for the District of the

> Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injuctions, except where direct review may be had in the Supreme Court;..."

2. United States Code, Title 45, Section 153, First (i) provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

> appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Statement of the Case

REA intends to rely on Johnson's statement of the Case. However, REA wishes to clarify two areas of disagreement it has with Petitioner's Statement of the Case."

(1) There is no support in the record below for Petitioner's description of his attempts to contact counsel (Petition, pp. 8-9).

(2) In the February, 1972 letter from Mr. Caldwell to Judge Brown, Mr. Caldwell specifically stated he did not represent Mr. Johnson. Therefore, his letter could not have constituted a request for an extension of time made on Mr. Johnson's

behalf.

I

THERE IS NO REAL CONFLICT WITH OTHER COURT OF APPEALS DECISIONS ON ANY IMPORTANT MATTERS

The Petition for Certiorari states that the Court of Appeals' rejection of the view that the period of limitation applicable to an action brought under 42 U.S.C. §1981 is tolled by the filing of a complaint with the Equal Employment Opportunity Commission results in an important conflict between the circuits. On the contrary, there is only a minor conflict of dicta which is neither important to this case, which can be decided on an independent ground, nor to other cases.

In both Macklin v. Spector Freight

Systems, Inc., 478 F. 2d 979 (D.C. Cir. 1973) and Boudreaux v. Baton Rouge Marine Contracting Company, 437 F. 2d 1011 (5th Cir. 1971), the respective Courts of Appeals took the position that filing of an E.E.O.C. complaint did toll the statute of limitations under Section 1981. However, the statements were in footnotes to the decision to "give guidance to the District Court" (Macklin, supra, at 944) or "for the guidance of the court on remand" (Boudreaux, supra, at 1017). Moreover, in Macklin a holding of the Court is inconsistent with the view expressed in the footnote dictum. Thus, the Court held that exhaustion of administrative remedy under Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-5c) is not required before a suit under Section 1981 may be brought, among

other reasons, because

> "...Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F. 2d at 996.

Moreover, the Court noted that among the wide differences were differences in statutes of limitations. If the schemes of the two statutes are so different that the difference in statutes of limitations did not require that one scheme be exhausted before another could be commenced, it seems unlikely that it would require tolling of one statute of limitations if the other was invoked. But until the D.C. Circuit carefully

considers the question in a case in which it is squarely posed, this Court cannot assume that it will follow the view expressed in the footnote. The Macklin Case was not such a case.

In any event, the inconsistency in dicta does not involve an important issue. In this case, the District Court dismissed the Section 1981 complaint also on the ground that plaintiff had failed to exhaust his administrative remedies. There is therefore an independent ground sustaining the decisions below, and the alleged conflict as circuits is therefore not important to this case. As for other cases, Title VII will always be available to any Plaintiff who files a complaint with the E.E.O.C. and could therefore take advantage of the tolling rule

Petitioner seeks to invoke. Hence, the effect of this rule will be negligible on most plaintiffs, except for the calculation of the amounts of damage. Such disputes over damages should not be the basis of undue allocation of this Court's time.

II

OTHER ISSUES RAISED BY PETITIONER DO NOT WARRANT EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY

A. The Interpretation of Tenn. Code §28-304

Johnson claims that Tenn. Code §28-304 which provides a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" is inapplicable to the complaint under Section 1981, or if applicable, violative of the U.S. Constitution.

Petitioner requests this Court to interpret a provision of state law upon which state courts have not interpreted. This Court has said:

> "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts...." Huddleston v. Dwyer, 322 U.S. 232,237 (1944).

There is no reason to vary this policy in this case.

Only upon interpretation of the statute by state courts can the constitutional questions raised by Petitioner be reached. In any event, the interpretation given to the statute by the Courts below raises no such questions. As the Court of Appeals noted, the statute applies to a wide

variety of personal tort actions and claims of malpractice. Placing civil rights violations in such category along with similar violations of law does not violate equal protection of the laws.

B. Exhaustion of Administrative Remedies Under the Railway Labor Act

Johnson claims that the district court erred in deciding that his claim under Section 1981 should be dismissed because of failure to exhaust administrative remedies under the Railway Labor Act. Petitioner cites Glover v. St. Louis & San Francisco R. Co., 393 U.S. 324 (1969) and Steele v. Louisville & Nashville Railroad Company, 323 U.S. 192 (1944).

In Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972), this Court held that a Plaintiff such as Mr. Johnson,

who complains of wrongful discharge, must utilize his Railway Labor Act remedies. Such remedies are set forth in Section 153, First (i) of the Railway Labor Act (45 U.S.C. §153, First (i)). Glover and Steele are not to the contrary. They involved cases of violation by a labor union of a duty of fair representation arising under the Railway Labor Act. In such cases, this Court has held it would be futile to exhaust administrative remedies. The standards, however, for liability under the Railway Labor Act are different than the standards under Section 1981. For one thing, under the Glover and Steele cases, the union is a necessary party who is alleged to have discriminated against its members. In such cases, arbitration of a Board chosen by the

union and company defendants might well be futile. But under Section 1981, where the union is not a necessary party and the plaintiff may succeed on the merits against his employer even if the union actively represents him, administrative remedies may not be futile, and the reasoning of Steele and Glover does not apply.

Johnson also contends that there exists a conflict in circuits. However, none of the cases cited except Macklin have anything to do with the requirement of exhausting employment arbitration remedies and Macklin only deals with that requirement in relation to the 1964 Civil Rights Act, not Section 1981. The fact that exhaustion of remedies under the Railway Labor Act may not be required for a complaint processed under the 1964 Civil Rights Act which (1) postdates the Railway Labor Act and (2) has extensive

administrative procedures of its own does not lead to the conclusion it is not required under Section 1981 which (1) predates the Railway Labor Act and (2) has no administrative procedures. This Court has ruled in Andrews that Railway Labor Act procedures must be exhausted, and Johnson has raised no issues which require modification of this ruling in this case.

C. Statute of Limitations

Johnson attacks the Courts below for failing to allow him more time to obtain counsel, and for failing to reopen the first action under Rule 60(b) of the Federal Rules of Civil Procedure.

What Johnson is asking would require this Court to delve into (1) questions of fact as to the notice Johnson received and on what date he was represented by counsel and (2) questions of whether the district judge abused his discretion in

failing to grant a motion that was never before him.

Johnson claims first that he did not have clear notice of the time limitation on the right to sue and therefore the 30 day time period should be deferred until he receives such notice (Petition, p. 20). According to Petitioner's Statement of Facts, he made numerous attempts to contact attorneys, and finally contacted a knowledgeable attorney by the end of the 30 day period. It certainly is a question of fact, for the District Court, to determine whether plaintiff had adequate notice. Certainly, Gates v. Georgia-Pacific Corp., 7 CCH EPD §9185 (9th Cir. 1974) does hold, as Petitioner claims, that where "the plaintiff has not had a clear notice of the time limitation on his right to

sue and has acted with all of the diligence and promptness which could be expected, it has been held that the limitations period does not start running until the plaintiff receives explicit notice." (Petition, p. 20). Instead, in that case, where the EEOC failed to mail the statutorily required notice to sue letter, the Court said:

> "We are convinced that, as a result of the Commission's error, appellee was confused, and, under the circumstances, acted with all of the diligence and promptness which could be expected. We restrict our holding to the facts of this case, and we express no opinion on the form of notice which might trigger the 30 day period under other circumstances." (7 CCH EPD ¶9185 at 6944)

Whether Petioner was confused is a question of fact this Court should not be called on to resolve.

Petitioner also claims that the Court should have treated Mr. Caldwell's letter of February 17 as the equivalent

of a motion for appointment of counsel. Once again this Court is called upon to make a finding of fact contrary to the finding of the Court of Appeals. For if the February 17 letter was "not an announcement that Caldwell was his counsel," (15a) as the Court of Appeals found, it would have been a violation of Johnson's rights to treat the letter as a motion by him -- only Johnson, not Mr. Caldwell, could request appointment of counsel.

Finally, Johnson claims that the district Court erred in failing to reopen the proceeding under Rule 60(b) of the Federal Rules of Civil Procedure.

In Klaprott v. United States, 335 U.S. 601 (1949), this Court reversed and remanded, for the only time, a failure of a U.S. District Court to set aside a prior judgment under Rule 60(b). The Court applied new provisions of amended Rule 60(b) which had been amended subsequent to the decisions of the Courts

below, which therefore did not have an opportunity to exercise their discretion as to the applicability of the amended rule. Moreover, the lower court has ordered denaturalization of a U. S. citizen, which this Court described as "more grave than consequences that flow from conviction for crimes....without evidence, a hearing, or the benefit of counsel, at a time when his Government was then holding the citizen in jail with no reasonable opportunity to defend his citizenship." 335 U.S. at 611, 615.

Short of such clearly extraordinary circumstances, this Court should not interfere with a district court's discretion in failing to reopen a proceeding under Rule 60(b), especially on its own motion. See Ackermann v. United States,

340 U.S. 173 (1950) for a refusal to reverse a failure to reopen a judgment where circumstances were less extraordinary than in Klaprott. Here, unlike Klaprott, the District Court had an opportunity to exercise its discretion on whether to invoke the Rule, it did have before it a motion challenging its procedure, the action was a civil proceeding without such serious adverse consequences to Johnson, Johnson had been free to act on his own behalf, or request the appointment of counsel, and Johnson had presumably had the advice of counsel for over three months, and for one month prior to time allowed to file a new complaint. In such circumstances, this Court should stay its hand.

D. Res Judicata

Petitioner finally claims that the

decision of Judge Brown granting summary judgment was not res judicata because it did not dispose of all claims against all defendants and was therefore not a final order under Rule 54(b) of the Federal Rules of Civil Procedure.

This claim ought not to be considered by this Court. The matters discussed heretofore constitute independent grounds which would dispose of the case, regardless of the disposition of the res judicata point. In any event, it is clear that an order for summary judgment as to some claims and parties is an order refusing an injunction and is therefore a final order under Section 1292(a)(1) of the Judicial Code (28 U.S.C. §1292(a)(1)). Glenmore v. Ahern, 276 F. 2d 525 (2d Cir. 1959), cert. den., Tri-Continental

Financial Corp. v. Glenmore, 362 U.S. 964 (1960); Build of Buffalo, Inc. v. Sedita, 441 F. 2d 284(2d Cir. 1971).

CONCLUSION

Certiorari should be denied and the petiton dismissed.

Respectfully submitted,

Peter G. Wolfe
Attorney for Respondent
REA Express, Inc.
219 East 42nd Street
New York, New York 10017

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the above Brief upon Deborah M. Greenberg, 10 Columbus Circle, New York, New York 10019 and James L. Highsaw, 1015 18th Street, N.W., Washington, D. C., by first class mail.

Peter G. Wolfe

Supreme Court, U. S.
MAY 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL IN OPPOSITION

JAMES L. HIGHSAW, JR.
HIGHSAW & MAHONEY
Suite 506
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
Attorney for Respondent Brotherhood Locals

Of Counsel:
WILLIAM J. DONLON, *General Counsel*
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
6300 River Road
Rosemont, Illinois 60018

May, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Statutes and Federal Rules Involved	3
Statement	4
Argument	7
I. The Decisions Below Are Clearly Correct And Raise No Substantial Federal Question	8
Conclusion	13
Appendix.	

INDEX TO CITATIONS

Cases:

Allied Air Freight v. Pan American World Airways, 393 F.2d 441 (2nd Cir., 1968), *cert. den.* 393 U.S. 846 11

Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers International Union, 447 F.2d 945 (7th Cir., 1971) 11

Pellicer v. Brotherhood of Railway and Steamship Clerks, 118 F.Supp. 254 (D.C. S.D. Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912 4

Rains v. Cascade Industries, Inc., 402 F.2d 241 (3rd Cir., 1968) 11

United States v. Wallace & Tiernan, 336 U.S. 793, 795 11

Statutes:

Civil Rights Acts:
42 U.S.C.A. §§ 1981, et seq. 2, 6, 7, 12, 13

Federal Rules of Civil Procedure:
Rule 33 8
Rule 54(b) 3, 10, 11

Railway Labor Act
45 U.S.C.A. §§ 151 et seq. 4

Title VII, Civil Rights Act of 1964
42 U.S.C.A. §§ 2000e, et seq. 2, 7, 12, 13

United States Code
Title 28, Section 1292(a)(1) 3, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL IN OPPOSITION

The Tri-State Local and the Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC Locals),[1] among the respondents in the

[1] The two local lodges were consolidated on December 8, 1971.

above-entitled case, submit this brief to the Court in opposition to the petition for certiorari to the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

A. The United States District Court for the Western District of Tennessee, Western Division, entered three orders as follows:

1. An order dated June 14, 1971, which (a) granted the motion of the BRAC Locals for summary judgment on petitioner's discrimination claims against the BRAC Locals; (b) granted the motions of the BRAC Locals and REA Express to dismiss petitioner's claims under Title 42, Section 1981 of the United States Code; (c) granted in part and denied in part the motion of REA Express for summary judgment on petitioner's discrimination claims; (d) denied the motions of the BRAC Locals to dismiss petitioner's Title VII claims on the ground that the action was not brought within thirty days after the Federal Equal Employment Opportunity Commission notified petitioner of his right to sue as the statute then required. This order is not officially reported and is reproduced at pages 1a-3a in the Appendix to the petition.

2. An order dated February 15, 1972 (entered February 16, 1972), dismissing the action without prejudice. This order is not officially reported and is reproduced at pages 4a-5a of the Appendix to the petition.

3. An order dated January 25, 1973, granting the motions of the BRAC Locals and REA Express to dismiss a second complaint, with identical claims to those in the first complaint, filed on May 31, 1972. This order is not officially reported and is reproduced at pages 6a-12a of the Appendix to the petition.

B. The Court of Appeals issued its opinion and judgment affirming the action of the District Court on November 27, 1973, which is reported at 489 F.2d 525 and reproduced at pages 13a-21a of the Appendix to the petition.

The Court of Appeals entered its order denying a petition for rehearing on January 15, 1974, reported at 489 F.2d 530 and reproduced at pages 22a-26a of the Appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of the respondent BRAC Locals, this petition presents the issue as to them only whether the District Court erred in dismissing on the basis of *res judicata* a complaint filed on May 31, 1972, against these respondents containing the identical allegations of racial discrimination set forth in an earlier complaint by the same petitioner of March 18, 1971, in the same Court, asking for injunctive and monetary relief, with respect to which the BRAC Locals were granted summary judgment on the merits on June 14, 1971, and no appeal was taken by petitioner either from that order or a subsequent order of February 16, 1972, dismissing the remaining issues against the other respondent REA Express.

STATUTES AND FEDERAL RULES INVOLVED

In addition to the statutory provisions quoted at pages 3-5 of the petition, there is involved the provisions of Title 28, Section 1292(a)(1) of the United States Code and Rule 54(b) of the Federal Rules of Civil Procedure. These provisions are quoted in the Appendix hereto.

STATEMENT

Petitioner is a Negro citizen of the United States and a resident of the State of Tennessee. He was an employee of REA Express from the spring of 1964 until June 20, 1967, when his employment was terminated by the carrier. While an employee of REA Express, he was a member of respondent Lily of the Valley Local (Petitioner's App. 1a-3a),[2] a subordinate unit of BRAC, the duly authorized representative under the Railway Labor Act of most of the employees of REA Express since 1929.[3] In 1952, BRAC and REA Express amended their collective bargaining agreement to fully integrate the seniority rights of REA employees regardless of race. A group of white employees brought suit to invalidate the integration agreement. This complaint was dismissed by the Federal District Court in Jacksonville, Florida, and such decision was affirmed by the United States Court of Appeals for the Fifth Circuit. These decisions set forth the facts with respect to the BRAC representation of black and white employees of REA Express and the integration of the seniority rosters. *Pellicer* v. *Brotherhood of Railway and Steamship Clerks,* 118 F.Supp. 254 (D.C. S.D., Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912.[4]

---

[2] Appellant's Appendix in Court of Appeals.

[3] BRAC Locals have a limited function of progressing grievances at a local level. They do not make agreements.

[4] BRAC recently successfully defended a Title VII action brought against BRAC and REA Express by white employees at the Birmingham, Alabama, facility of the carrier based on the 1952 integration. *Barbour* v. *REA Express, et al.* (Civil Action No. 72-235, D.C. N.D. Ala., S.D.). On October 17, 1973, the District Court, after a trial on the merits, upheld the integration under Title VII.

It was under this seniority system that petitioner Johnson became an employee of REA Express in 1964. He was able to bid for any job within his seniority district for which he was qualified and did obtain a bulletined or permanent job as a driver of REA Express vehicles in the Memphis area. He was holding this job when his employment was terminated by REA Express on or about June 20, 1967. Petitioner never at any time filed a grievance with BRAC Lily of the Valley Local alleging any violation of his rights by his employer REA Express (Petitioner's App. 83a-92a).

On March 18, 1971, petitioner filed his first complaint in the District Court against REA Express and the BRAC Locals alleging that REA Express had terminated his employment for reasons of race; that the carrier had denied him the opportunity to obtain supervisory training and promotion given to white employees; and that the carrier assigned, re-assigned, and promoted employees so as to maintain a pattern of racial discrimination. The complaint against the BRAC Locals was that the plaintiff had been denied membership in the BRAC Tri-State Local; that the BRAC Locals failed to defend the rights of black members in the same manner as they defended the rights of white employees; and that the BRAC Locals participated in the alleged discrimination in the assignment, re-assignment, and promotion of black employees of REA Express (Petitioner's App. 48a-54a).

BRAC filed a motion on April 30, 1971, to dismiss the complaint or, in the alternative, for summary judgment on legal grounds. The alternative motion for summary judgment was amended when petitioner's answers to interrogatories showed that the allegations

in the complaint as to the BRAC Locals were mere conclusions not supported by any facts. REA filed a similar motion. The same motions were filed in a companion case (Civil Action No. C-71-2) brought by a Mr. Thomas Thornton, who was also a black employee of REA Express (App. to Petition 1a).

Court-appointed counsel for petitioner appeared before the District Court to oppose the motions in the two separate cases and fully argued the position of the plaintiffs (Petitioner's App. 97a). The order of the District Court dated June 14, 1971, granted the BRAC Locals summary judgment in both cases with respect to the claims of discrimination and also dismissed the Section 1981 action under the Tennessee statutes of limitations. REA was left as a defendant in the two cases as to some of the discrimination claims. Neither petitioner nor Mr. Thornton appealed this order.

Thereafter, the two cases were set for trial against REA on February 2, 1972. The attorney for the two plaintiffs obtained an offer of settlement from REA Express which was accepted by Mr. Thornton and rejected by petitioner. The attorney for petitioner filed a motion with the District Court on January 7, 1972, to be relieved of the representation, stating that in view of the staleness of petitioner's claims and for other reasons he had strongly recommended the settlement. The motion was granted on January 14, 1972, and on that date, at the direction of the Court, the Clerk wrote to petitioner advising him that he had 30 days from January 14, 1972, to obtain counsel or the case would be dismissed without prejudice. Petitioner neither obtained other counsel within the time limit or requested an extension of time. The District Court, therefore, on

February 16, 1972, dismissed the action (App. to Petition, 4a, 5a).

On February 17, 1972, attorney William E. Caldwell wrote to the District Court requesting that the 30-day period be extended an additional 30 days (Petitioner's App. 35a). The request was denied because the action already stood dismissed (Petitioner's App. 39a).

On May 31, 1972, petitioner filed a second complaint against REA Express and the BRAC Locals substantially identical to the original complaint (Petitioner's App. 1a). This complaint was dismissed as to the BRAC Locals on grounds of *res judicata*. The District Court also found that the second complaint was not timely filed under Title VII of the Civil Rights Act and was barred as was the original complaint with respect to the invocation of Sections 1981, 1982, and 1983 of Title 42 of the United States Code, by the applicable Tennessee statutes of limitations (App. to Petition, 6a-12a). The Court of Appeals affirmed the dismissal of the second complaint (App. to Petition, 13a-21a) and denied a petition for rehearing (App. to Petition, 22a-26a).

ARGUMENT

This case is presented in a factual and legal framework which makes it entirely inappropriate for review by this Court. It involves a situation in which the respondent BRAC Locals were granted judgment on the merits of petitioner's claims of racial discrimination by the District Court; the petitioner did not at any time appeal this judgment as to the BRAC Locals although he could have done so; the remaining portion of the action was subsequently dismissed as to the other

respondent, and no appeal was taken from such order; and finally the same complaint was filed a second time in the same District Court against the BRAC Locals some 11½ months after these respondents were granted judgment on the merits of the same claims and some 3½ months after the District Court wiped out the remnants of the action against the other respondent. The District Court correctly dismissed the second complaint against the BRAC Locals and the Court of Appeals correctly affirmed such judgment. Any other result would, as the Court of Appeals observed, destroy orderly litigation, inordinately delay the processing of claims, and be unfair to respondents. No substantial Federal question is presented for review by this Court.

I.

The Decisions Below Are Clearly Correct and Raise No Substantial Federal Question

Petitioner argues that the decision of the District Court affirmed by the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Otherwise, petitioner asserts, the values of the Civil Rights Acts will be frustrated by technical rules, woodenly applied, to the benefit of large corporations and powerful unions.[5] To the

[5] The powerful union of which the petitioner speaks is a local lodge of employees of REA Express in Memphis, Tennessee, with approximately 108 employed members limited to processing of local grievances, and whose principal officer receives a salary of less than $25.00 a month. The organization with which petitioners' principal attorneys are associated is several times larger and more powerful than the union respondents. The large corporation is an express carrier whose operations in the last 30 years have shrunk to such an extent that the number of its regular employees has decreased approximately 90% and which on August 6, 1974, will lose some 40% of its revenue pursuant to recent orders of the Civil Aeronautics Board ending the REA-airlines air express contract on that date.

contrary, the decisions of the lower Courts are clearly correct.

Petitioner's argument that he has been denied a hearing on his claims is simply not true. These respondents submitted written interrogatories to the petitioner with respect to these claims pursuant to Rule 33 of the Federal Rules of Civil Procedure (Petitioner's App. 83a). When the answers to these interrogatories revealed that the claims were without substance, the respondent unions moved for judgment on the merits, an extensive hearing was conducted before Chief Judge Brown of the District Court at which petitioner was fully represented by counsel, and on June 14, 1971, the District Court granted judgment to the BRAC Locals on these claims. Partial judgment was granted to respondent REA (Petitioner's App. 46a, 90a, 94a, 97a). No appeal was taken from this order. Subsequently, on February 16, 1972, the District Court dismissed the remainder of the action against REA (Petitioner's App. 106a). No appeal was then taken. Instead, three and one-half months later petitioner filed a second complaint with the identical claims against the BRAC Locals with respect to which those respondents had been granted judgment on the merits nearly a year earlier. The District Court held that such claims were barred by the doctrine of *res judicata* (App. to Petition, 6a). The Court of Appeals affirmed. On this point, the District Court stated (App. to Petition, 9a):

> "This action clearly involves the same parties and the same subject matter of dispute as were

before Judge Brown. Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim after a final disposition by Judge Brown. *Sopp* v. *Gehrlin*, 236 F.Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree*, 326 F.Supp. 755 (E.D. Pa. 1971), *Vassos* v. *Societa Trans-Oceania*, 272 F.2d 182 (2nd Cir. 1960), *cert. denied, Haldane* v. *Wilhelmina Helen King Chagnon*, 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a 'second bite at the apple' after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction."

The Court of Appeals agreed as follows (App. to Petition, 23a footnote 1):

> "The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned."

These holdings are clearly correct.

Petitioner's argument that the District Court's order of June 14, 1971, was neither final nor appealable under Rule 54(b) of the Federal Rules of Civil Procedure is wholly without merit. The decisions are unanimous to the effect that Rule 54(b) is not applicable to orders

appealable under 28 U.S.C.A., Section 1292. *Atlantic Richfield Co.* v. *Oil, Chemical and Atomic Workers International Union*, 447 F.2d 945 (7th Cir., 1971); *Rains* v. *Cascade Industries, Inc.*, 402 F.2d 241 (3rd Cir., 1968); and cases cited therein. The order was clearly appealable under Section 1292(a)(1) because it granted judgment on a complaint which is described in paragraph I thereof as "a suit in equity" and which in paragraph XII sought preliminary and permanent injunctive relief and incidental damages by way of back pay. *Rains* v. *Cascade Industries, Inc.*, 402 F.2d 241 (3rd Cir., 1968).

Moreover, even if Rule 54(b) applied to the District Court's order of June 14, 1971, the Court's order of February 16, 1972, dismissing the remainder of the action, made the earlier order final and appealable. The petitioner's argument that this is not so because the latter order was without prejudice is equally without merit. *United States* v. *Wallace & Tiernan*, 336 U.S. 793; *Allied Air Freight* v. *Pan American World Airways*, 393 F.2d 441 (2nd Cir., 1968), *cert. den.* 393 U.S. 846. In the *Wallace & Tiernan* case, page 795, this Court rejected petitioner's argument.

The suggestion that petitioner should be allowed to relitigate the same claims against respondent unions because of alleged inadequate representation is also without merit. As the District Court pointed out (App. to Petition, 9a), the contention cannot affect the finality of the unappealed order. Moreover, petitioner was adequately represented. Petitioner's attorney did appear and did vigorously oppose the motions of respondents. Indeed, he was successful with respect to the basic issue of whether the complaint had been timely

filed and, except for one claim, with respect to the motion of REA for summary judgment (App. to Petition, 1a-5a).[6] The complaint bears ample witness to his competency (Petitioner's App. 48a). Present counsel copied it in filing the second complaint. The fact no appeal was filed from the order of June 14, 1971, was clearly based on his judgment as to the lack of merit in petitioner's claims against respondent unions as shown by his later request to withdraw. On and after February 17, 1972, while appeal time was running on the order of February 16, 1972, petitioner's present counsel were aware of that fact and were acting for petitioner while they debated whether the case had sufficient merit to warrant further expenditures of time and money. (Petitioner's App. 35a, 37a).

The remaining contentions of petitioner with respect to the decisions below on jurisdictional aspects of the second complaint under Title VII and the treatment accorded his invocation of Title 42, Section 1981 of the United States Code, as an alternative basis for jurisdiction, are irrelevant insofar as the petition seeks to review the judgment below as to respondent BRAC Locals. As the Court of Appeals found (App. to Petition, 23a), "the unions have a complete defense on the ground of res judicata". Moreover, for the reasons stated in the Court of Appeals decision and the denial of the petition for rehearing those aspects of the decisions below are correct and present no substantial Federal question. Likewise, petitioner's effort (Pet. 13) to create a conflict between the Court of Appeals and decisions of the Fifth Circuit in the *Boudreaux* case

[6] The District Court's decision in favor of petitioner on these issues clearly shows that the Court was not woodenly applying procedural requirements to petitioner.

and in the District of Columbia in the *Spector* case with respect to the tolling issue must fail since the petitioner is citing *dicta* in footnotes in the latter cases not applicable to the issues before those Courts. Finally, such alleged conflict does not relate to the decisions below as to the BRAC Locals since the dismissal of the second complaint against these respondents on grounds of *res judicata* applied to both Title VII and Section 1981.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES L. HIGHSAW, JR.
HIGHSAW & MAHONEY
Suite 506
1015 Eighteenth Street, N.W.
Washington, D.C. 20036
Attorney for Respondent Brotherhood Locals

Of Counsel:

WILLIAM J. DONLON, *General Counsel*
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS
6300 River Road
Rosemont, Illinois 60018

May, 1974

[7] The petitioner agrees that the dismissal of the second complaint as to the BRAC Locals on grounds of *res judicata* is applicable to both Title VII and Section 1981 (Pet. 12). This must necessarily be true as the claims of discrimination are the same under both statutes.

APPENDIX

Title 28, Section 1292(a)(1) of the United States Code

"*§ 1292. Interlocutory decisions*

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

Rule 54(b) of the Federal Rules of Civil Procedure

"*Rule 54. Judgments; Costs*

"(a) * * * *

"(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."

Supreme Court, U. S.
FILED
MAY 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this Reply Brief in support of his petition for a Writ of Certiorari.

Respondents do not deny that the decision of the Sixth Circuit in the instant case that the filing of an EEOC charge does not toll the statute of limitations under § 1981 is squarely in conflict with the contrary holdings of the Fifth and District of Columbia Circuits in *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, n.15 (5th Cir. 1971), and *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95, n.30 (D.C.Cir. 1973). Respondents suggest that this conflict is unimportant because the holdings in *Boudreaux* and *Macklin* were mere dicta. Brief of Respondent REA Express, Inc., pp. 7-8; Brief of Respondent Brotherhood of Railway Clerks, pp. 12-13. This is neither accurate nor relevant.

In *Macklin* the plaintiff alleged that jurisdiction over his employment discrimination claim was conferred by both Title VII and § 1981. The D.C. Circuit upheld the action on both grounds, and necessarily reached the tolling question because it controlled the date from which plaintiff was entitled to back pay. 478 F.2d 979, 994, n.30. In such a decision based on alternative grounds the court's holdings regarding § 1981 are plainly no more dicta than its decisions concerning Title VII. In *Boudreaux*, also an action under both Title VII and § 1981, the Fifth Circuit held that the filing of an EEOC charge tolled the statute of limitations, and that the plaintiff therefore had a cause of action. The Court of Appeals also held the plaintiff could establish a Title VII claim on remand if he proved certain facts. 437 F.2d 1014-16. The decision on § 1981 was sufficient to establish jurisdiction, and on remand the case proceeded as a § 1981 action without any inquiry regarding the facts needed to establish a Title VII action.

Regardless of whether the holdings in *Macklin* and *Boudreaux* are characterized as "dicta", it is undisputed that those decisions establish the rule of law to be applied in the District of Columbia and Fifth Circuits respectively. On April 29, 1974, five months after the Sixth Circuit decision in the instant case, the Fifth Circuit rejected the rule adopted below and reaffirmed its decision that the filing of an EEOC charge tolls the statute of limitations for § 1981. *Pettway* v. *American Cast Iron Pipe Co.*, 7 EPD ¶ 9291, p. 7369, n. 130. The rule of *Boudreaux* and *Macklin* is of course being followed by the district courts in the Fifth Circuit. See *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972). When such an inescapable conflict exists among the circuits, certiorari should be granted so that this Court can resolve the matter.

Respondent REA Express urges, in the alternative, that plaintiffs' complaint was properly dismissed because no employee subject to the Railway Labor Act can sue § 1981 without first exhausting certain administrative remedies under the Railway Labor Act. Brief of Respondent REA Express, pp. 12-15. In *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969), this Court held that an employee need not exhaust his administrative remedies under the Railway Labor Act prior to commencing a civil action where resort to such remedies would be futile since those to whom the grievance must be submitted would be chosen by the defendants against whom the complaint was made. 393 U.S. at 330-31. In the instant case the complaint alleges, as did the complaint in *Glover*, that both the union and the employer are involved in the discriminatory practices complained of. Respondent suggests that *Glover* was overruled or limited by this Court's recent decision in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). *Andrews*, however, involved a dispute as to the interpretation of a collective bargaining agreement and the plaintiff's grievance was solely with the employer, not his union, and is clearly distinguishable from both *Glover* and the instant case.

The Respondent Union suggests that plaintiff is bound because he did not appeal from two interim decisions of the District Court. Brief of Respondent Brotherhood of Railway Clerks, pp. 8-13. First the union urges that plaintiff was obligated to appeal from the order of February 16, 1972, dismissing without prejudice his first complaint. The basis for that dismissal, however, was that plaintiff was unable to pursue his district court action for want of counsel. Obviously the same lack of counsel which prevented plaintiff from litigating in the district court made it impossible for him to appeal anything in February 1972. In the

alternative, the Union urges that plaintiff was obligated to appeal from the District Court's decision of June 14, 1971, granting judgment for the union on all claims and for the employer on some, but continuing the litigation as to the remaining claims against the employer. The union suggests that any order denying relief against one or more defendants on one or more equitable claims in a Title VII action is immediately final and appealable, and must be appealed at once. Virtually all Title VII cases involve interim decisions in the district court, prior to completion of all litigation at the trial level, granting or denying partial relief or dismissing particular claims or defendants. Utter havoc would be wreaked by a rule such as that advanced by the union requiring that, upon the entry of each of these interim orders, all district court proceedings had to grind to a halt pending an interlocutory appeal. Since no appeal of the February 16, 1972, decision was possible, and no interlocutory appeal of the June 14, 1971 decision was appropriate, the doctrine of *res judicata* cannot be interposed to prevent the litigation on appeal of those decisions in the instant case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

Supreme Court, U. S.
FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103
Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 2

Argument 8

Conclusion 17

Table of Authorities

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 8, 8n, 11, 12n, 13n

American Pipe and Construction Co. v. Utah, 414 U.S 538 (1974) 12, 13, 14

Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 14, 15n

Brady v. Bristol Myers, Inc., 459 F.2d 621 (8th Cir. 1972) 8n

Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972) 8n

Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 12, 13, 15

Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972) 8n

Culpepper v. Reynolds Metals, 421 F.2d 888 (5th Cir., (1970) 16, 16n

PAGE

EEOC v. E.I. Dupont de Nemours & Co., 373 F.Supp. 1321 (D. Del. 1974) 9n

Guerra v. Manchester Terminal Corp., 350 F.Supp. 529 (S.D. Tex. 1972) 15n

Henderson v. First National Bank of Montgomery, 344 F.Supp. 1373 (M.D. Ala., 1972) 15

Long v. Ford Motor Co., 7 CCH EPD ¶9290 (6th Cir. 1974) 8n

LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973) 10n

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 7, 8n, 9n, 14

Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972) 16n

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 15n

Reynolds v. Daily Press Inc., 5 CCH EPD ¶7991 (E.D. Va. 1972) 14, 15

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) 8n

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 10n

Schiff v. Mead Corp., 3 CCH EPD ¶8043 (6th Cir. 1970) 16

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 13n, 15

PAGE

Waters v. Wisconsin Steel Works of International Harvester Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 8n, 9n, 15

Wells v. Gainesville-Hall County Economic Opportunity Organization, Inc., 5 CCH EPD ¶8541 (N.D. Ga. 1973) 16n

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 8n

Statutes:

Civil Rights Act of 1866, 42 U.S.C. §1981 ..... *passim*

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

Federal Employer's Liability Act, 42 U.S.C. §§51 *et seq.* 13

Federal Rules of Civil Procedure, Rule 60(b) 7

Tennessee Code Ann. §28-304 ..... 6n, 7, 9n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR PETITIONER

Opinions Below

1. District Court's order in No. C-71-66 dismissing claims under 42 U.S.C. §1981 and granting summary judgment to union locals and partial summary judgment to REA Express[1] on Title VII claims, June 14, 1971, reported at 7 CCH EPD ¶9108 (91a-93a).[2]

2. District Court's order in No. C-71-66 dismissing action without prejudice, February 16, 1972, reported at 7 CCH EPD ¶9109 (47a-48a).

3. District Court's opinion and order in No. C-72-183 dismissing refiled complaint, January 25, 1973, reported at 7 CCH EPD ¶9110 (98a-104a).

---

[1] Effective June 1, 1970, respondent company's corporate name was changed from Railway Express Agency, Inc. to REA Express, Inc. (52a).

[2] This form of citation is to pages of the Appendix.

4. Opinion of Court of Appeals, November 27, 1973, reported at 489 F.2d 525 (105a-113a).

5. Order Denying Rehearing, January 15, 1974, reported at 489 F.2d 525, 530 (114a-118a).

Jurisdiction

The Court of Appeals entered judgment on November 27, 1973. A timely request for rehearing was denied January 15, 1974. The petition for certiorari was filed April 15, 1974, and was granted on June 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?

Statement of the Case

Petitioner Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment.

Petitioner was hired by respondent REA Express, Inc. ("REA") in the spring of 1964 as an express handler in Memphis, Tennessee.

On May 31, 1967, petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") charging respondent REA with discriminating against its black employees with respect to seniority rules and job assignments. He also charged respondent union locals with

maintaining racially segregated locals, Brotherhood of Railway Clerks Tri-State Local for whites and Lily of the Valley Local for blacks. On June 20, 1967, respondent REA terminated petitioner's employment, and on September 6, 1967, petitioner amended his EEOC charge to allege that he had been discharged because of his race (14a-16a).

The EEOC issued an investigation report on December 22, 1967, concluding that REA directed black employees to membership in Lily of the Valley Local and white employees to membership in Tri-State Local, that membership dues were higher in the black local than in the white local, that REA maintained racially segregated job classifications, that respondent REA's seniority and job assignments were discriminatory, that REA discriminated against blacks in the imposition of disciplinary action, and that petitioner was discriminatorily discharged (32a-40a). On March 31, 1970, the EEOC issued a decision finding reasonable cause to believe that respondent had violated Title VII of the Civil Rights Act of 1964, and on or about January 15, 1971, petitioner received from EEOC a notice of his right to bring suit within 30 days (8a).

Petitioner was unable to obtain private counsel and District Judge Bailey Brown entered an order February 12, 1971, appointing an attorney to represent petitioner and allowing petitioner's notice of right to sue to be filed as a complaint on a pauper's oath (Civil Action No. C-71-66) (8a).

The court-appointed attorney filed a "Supplemental Complaint" alleging violation of Title VII and 42 U.S.C. §§1981 *et seq.*, and invoking the Court's jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5f. The complaint, filed March 18, 1971, alleged that respondent REA, in conjunction with respondent union locals, engaged in a policy and practice of discriminating against black employees with

respect to promotional opportunities and that respondent's job assignment and promotion practices served "to maintain a preexisting pattern of racial discrimination in employment". Petitioner further alleged that he had been denied supervisory training and promotion opportunities which were accorded to white employees, that respondent union locals did not afford black members (including petitioner) the same quality of representation afforded to white members, and that petitioner's discharge was the result of respondent REA's racially discriminatory employment practices. Petitioner prayed for preliminary and permanent injunctive relief, back pay, costs and attorney's fees (60a-66a).

Respondents REA and union locals filed their answers on March 29 and April 6, 1971, respectively. The case was then scheduled for trial on August 18, 1971 (8a). On April 30 and June 3, 1971, the unions and REA, respectively, filed motions to dismiss or in the alternative for summary judgment (8a). Petitioner's court-appointed attorney filed no memoranda or affidavits on behalf of petitioner in opposition to these motions (8a-9a).

Judge Brown entered an order June 30, 1971 which, *inter alia*, 1) dismissed all claims based on 42 U.S.C. §1981 as barred by Tennessee's one-year statute of limitations for actions "for compensatory or punitive damages, or both, brought under the federal civil rights statutes"; 2) granted summary judgment to the defendant unions on the grounds that "from the undisputed facts" plaintiffs had no grounds for relief under Title VII; and 3) granted REA partial summary judgment on the issue of improper supervisory training (91a-93a). The case having been rescheduled for trial on February 2, 1972, respondent REA served petitioner with interrogatories, filed a pre-trial memorandum as required by local rules of court, and took petitioner's deposition. Petitioner's court-appointed counsel took no

discovery, by interrogatories, deposition, or otherwise, and filed no pretrial memorandum (9a).

REA offered Johnson a settlement of one hundred and fifty dollars which Johnson refused. Petitioner's counsel then filed, on January 5, 1972, a motion to be relieved as attorney of record on the grounds that petitioner's case was "questionable", petitioner had not substantiated money damages and had not expressed an intention of advancing the funds necessary for taking depositions, and because petitioner had refused REA's settlement offer. The clerk of the district court advised petitioner by letter dated January 14, 1972 that the motion to withdraw had been granted, and informed plaintiff that if he did "not obtain another counsel to represent [him] within 30 days from this date, [his] claim will be dismissed without prejudice" (9a-10a).[3]

Upon receipt of the clerk's letter, petitioner, in an effort to obtain representation, contacted the Memphis EEOC field attorney, the Memphis & Shelby County Legal Services Association, the Shelby County Bar Association Legal Referral Service, and two private attorneys. Finally, toward the end of the 30 days he went to the firm of Ratner, Sugarmon & Lucas and explained his plight to William E. Caldwell of the firm (10a). On February 17, 1972 Caldwell wrote a letter to Judge Brown indicating that he was attempting to obtain financial support for the litigation and requesting an additional thirty days for the petitioner to obtain counsel (45a-46a). However, the preceding day, February 16, Judge Brown had entered an order dismissing petitioner's case "without prejudice" (47a-48a).

[3] Petitioner received no notice of a hearing on the motion to withdraw and was afforded no opportunity to state his position. The court made no finding that petitioner was either unable or unwilling to proceed *pro se* or that petitioner was responsible for any delay in bringing the case to trial. No order granting the motion to withdraw was ever entered.

On May 5, 1972, Caldwell again wrote to Judge Brown indicating that the NAACP Legal Defense and Educational Fund had agreed to pay litigation costs for petitioner, entering an appearance for petitioner, and requesting that the order of February 16 be vacated and that the case be reinstated on the active docket of the court (49a-50a). Judge Brown replied on May 8, 1972 indicating that the "proper way to handle this matter would be to file a new action since the old one has long been dismissed" (51a).

Pursuant to Judge Brown's letter, Caldwell, on May 31, 1972, filed a new complaint on petitioner's behalf (Civil Action No. C-72-183), assigned to District Judge Harry W. Wellford. The new complaint reiterated petitioner's original allegations (4a-13a). Respondents REA and union locals moved for dismissal or for summary judgment on the grounds of untimeliness and *res judicata* (58a-59a, 94a-99a). The district court, *per* Judge Wellford, entered an order of dismissal on the grounds that 1) petitioner's claims under 42 U.S.C. §§1981 *et seq.* were barred by Tennessee's one-year statute of limitations on "actions for compensatory, or punitive damages, or both, brought under the federal civil rights statutes";[4] 2) petitioner had "failed to meet the statutory requirements" of Title VII because he failed to refile his suit within 30 days after Judge Brown's February 16, 1972 order of dismissal without prejudice, 3) Judge Brown's interlocutory order of June 14, 1971 granting summary judgment to respondent union locals and partial summary judgment to respondent REA was a "final disposition" constituting *res judicata*, and 4) petitioner's claims under 42 U.S.C. §§1981 *et seq.* were barred because he had not pursued his administrative remedies under the Railway Labor Act (98a-104a).

[4] Tenn. Code Ann. §28-304.

The Court of Appeals, in an opinion by Judge Weick, affirmed the order of dismissal, disposing of the case on timeliness grounds. First, the court held that petitioner's claims under 42 U.S.C. §1981 were time-barred by the running of the statute of limitations. In reaching this conclusion as to the Section 1981 claims the Court of Appeals held: a) that the applicable statute was the one-year limitation contained in Tenn. Code Ann. §28-304; and b) that the running of the statute on the Section 1981 claims was not tolled by petitioner's timely filing of charges with EEOC. Second, the court held that the Title VII claims were jurisdictionally barred because "at a minimum [petitioner] had to file the new case within thirty days from the date of dismissal without prejudice"[5] (105a-113a). The Court of Appeals did not discuss the issues of *res judicata* and exhaustion of remedies under the Railway Labor Act or an additional question assigned for error, the failure of the District Court to grant petitioner relief from the dismissal without prejudice pursuant to Rule 60(b), F.R. Civ. P.

In its opinion denying rehearing, the Court of Appeals reaffirmed its initial opinion, stating that Tennessee's attempted application of a one-year limitation period to all civil rights actions, regardless of their nature, is not "arbitrary in a constitutional sense" and the statute does not create "an explicit racial classification . . . because citizens of all races are entitled to take advantage of the federal civil rights statutes" (114a-118a). It explicitly rejected the holding of *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-995 n.30 (D.C. Cir. 1973)

[5] With regard to Judge Brown's February 16, 1972 order of dismissal without prejudice, the Court of Appeals stated:

> "We need not determine the propriety of this order because it was a final order from which no appeal was taken" (107a).

that the filing of petitioner's EEOC charge tolled the running of the state statute of limitations on his Section 1981 claim (114a-118a).[6]

This Court granted Certiorari to consider the tolling question. If petitioner prevails, the issue of the timeliness of refiling his Title VII action will be moot since he will be able to proceed under Section 1981. We submit that the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification,[7] and the exhaustion issue should be remanded to the Court of Appeals for decision.

Argument

As this Court has pointed out in *Alexander* v. *Gardner-Denver*, —— U.S. ——, 39 L.Ed. 2d 147, 158 (1974), Congress has deliberately created a variety of remedies against racial discrimination in employment. It is well established that an aggrieved employee can bring suit under 42 U.S.C. §1981 (Civil Rights Act of 1866), and that this statute creates a right of action independent of that embodied in 42 U.S.C. §§2000e, *et seq.* (Title VII of the Civil Rights Act of 1964).[8]

[6] In a footnote, the Court stated that it agreed with the district court on the *res judicata* question (114a).

[7] The order of summary judgment was interlocutory and was limited to petitioner's Title VII claims (92a).

[8] *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Long* v. *Ford Motor Co.*, 7 CCH EPD ¶9290 (6th Cir. 1974); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d (7th Cir.), *cert. denied*, 400 U.S. 911 (1970); *Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc.*, 476 F.2d 979 (D.C. Cir. 1973). See also *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed. 2d 147, 158 & n. 7, 9.

Petitioner initiated proceedings under Title VII by filing a charge with the EEOC on May 31, 1967, while still employed by REA. His employment was terminated on June 20, 1967. If the one-year statute of limitations which the courts below applied to petitioner's Section 1981 claim were not deemed tolled by the filing of his EEOC charge, petitioner would have to have filed suit under this section no later than June 20, 1968.[9] The EEOC did not issue its finding of reasonable cause until March 31, 1970, twenty-one months later. The EEOC did not issue a right-to-sue letter until January 10, 1971, two and one-half years later.[10] It is likely that had petitioner brought suit under Section 1981 within one year following termination of his employment, the suit would have reached final disposition long before the EEOC completed its processing of petitioner's charge. And as the course of petitioner's journey through the courts illustrates only too well, the road to relief under Title VII contains too many procedural pot-holes for the

[9] Congress did not enact a statute of limitations applicable to 42 U.S.C. §1981. Pursuant to 42 U.S.C. §1988, the applicable statute of limitations is that which governs the most analogous state action. *Waters* v. *Wisconsin Steel Works, supra*, 427 F.2d at 488; *Macklin* v. *Spector Freight Systems, Inc., supra*, 478 F.2d at 994.

The Court below held that the most analogous state statute of limitations is Tenn. Code 28-304, which provides a one-year limitation on the commencement of, *inter alia*, "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes". In his Petition for a Writ of Certiorari, petitioner contended that this statute was inapplicable by its terms to the case at bar, and that if it were applicable, it would be violative of both the supremacy clause of Article VI of the Constitution and the equal protection clause of the Fourteenth Amendment. The Court did not grant certiorari on these questions.

[10] The delay in the processing of petitioner's charge was not aberrational. See *EEOC* v. *E.I. Du Pont de Nemours & Co.*, 373 F.Supp. 1321, 1329 & n. 6-11 (D. Del. 1974).

employee willingly to forego his cause of action under Section 1981.[11]

Title VII, on the other hand, is in some instances the better remedy under which to litigate employment discrimination claims, particularly for aggrieved individuals who can ill afford to pursue their remedy under Section 1981. In enacting Title VII, Congress created for the benefit of a complainant the EEOC, whose purpose is to investigate and conciliate claims on the complainant's behalf.[12] It also created an effective judicial enforcement scheme for the vindication of complainant's rights. Under Title VII, as amended in 1972, the Commission has the authority to sue on behalf of the complainant,[13] and to compensate all witnesses who appear on behalf of the Commission during its investigatory proceeding or in court.[14] Furthermore, the Act authorizes EEOC to seek "pattern and practice" relief including remedies for complainants.[15] Moreover, an aggrieved party may, as petitioner did in the instant case, upon application have the court appoint an attorney to assert his claims without the payment of fees, costs, or security.[16]

From the point of view of an individual with limited resources, unable to obtain counsel, it is more desirable to file a charge under Title VII and thus have made available

[11] See, e.g., *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (scope of judicial complaint is limited to scope of EEOC investigation which can reasonably be expected to grow out of charge of discrimination); *LeBeau* v. *Libby-Owens-Ford Co.*, 484 F.2d 798 (7th Cir. 1973) (international union dismissed from Title VII action where EEOC charge named only local).

[12] 42 U.S.C. §2000e-4(a).

[13] 42 U.S.C. §2000e-5(f)(1).

[14] 42 U.S.C. §2000e-4(g)(2).

[15] 42 U.S.C. §2000e-6 and 6(e).

[16] 42 U.S.C. §2000e-5(f)(1).

to him the full resources of the EEOC than to commence litigation under Section 1981. As long as he has reason to hope that he can get the relief he seeks by resort to the EEOC, he should not have to go to the expense of filing suit.

The position taken by the Sixth Circuit Court of Appeals is incompatible with the flexible approach to overlapping remedies in employment discrimination cases—viz., that pursuit of one does not preclude another—taken by this Court in *Alexander* v. *Gardner-Denver Co., supra,* and, if allowed to stand, would both interfere substantially with the successful administration of Title VII and be adverse to the interests of judicial economy.

In *Alexander,* this Court held that submission of a claim of racial discrimination in employment to arbitration under the non-discrimination clause of a collective bargaining agreement did not bar the employee from suing his employer under Title VII. This Court rejected the doctrine of election of remedies, stating that "the legislative history of Title VII manifested a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." 39 L.Ed. 2d at 158-59. The Court went on to reject the argument that federal courts should defer to arbitral decisions on discrimination claims under certain circumstances, observing:

> "A deferral rule might also adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less."

39 L.Ed. 2d at 164.

The relationship, in *Alexander*, between arbitration and litigation under Title VII, is analogous to the relationship in the instant case between the EEOC fact-finding and conciliation processes and litigation under 42 U.S.C. §1981. The reasoning that led the Court to accommodate both avenues of redress in *Alexander* applies with equal, if not greater, force to the case at bar. It is obvious that the necessity of complying with a short statute of limitations even though a charge was pending before the EEOC would discourage and/or render futile recourse to the Congressionally favored policy of conciliation,[17] "[t]he possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 164. *Cf., American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 555-56 (1974).

This Court has stated that statutes of limitation are "primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* [321 U.S. 342, 348-49 (1944)]." *Burnett* v. *New York Central R. Co.,* 380 U.S. 424, 428 (1965). Clearly, the policies underlying the statute of limitations applicable to petitioner's Section 1981 claims were served by the filing of his EEOC charge.

Where the policies of ensuring essential fairness to defendants and of barring a plaintiff "who has slept on his

[17] *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 156.

rights" are satisfied, statutory periods of limitation should be tolled where to do so would lead to the vindication of petitioner's rights, thereby promoting Congressional policy embodied in "humane and remedial" legislation, and would further the interests of judicial economy. *Burnett* v. *New York Central R. Co., supra,* 380 U.S. at 428, 434; *American Pipe and Construction Co.* v. *Utah, supra,* 414 U.S. at 555-56.[18]

In *Burnett* v. *New York Central R. Co., supra,* petitioner had timely filed an action in state court under the Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.* After the action was dismissed for improper venue, petitioner brought an identical action in federal district court. The District Court dismissed the complaint on the ground that it was barred by the limitation provision embodied in the FELA, and the Court of Appeals affirmed. This Court reversed, holding that the limitations statute was tolled during the pendency of the state action. The Court observed that to hold otherwise would discourage FELA actions in the courts of certain states, in contravention of the intent of Congress, in providing for concurrent state and federal court jurisdiction, to protect the plaintiff's right to bring an FELA action in state court. *Id.* at 434. Similarly, not to permit tolling in the instant case would discourage the bringing of actions under Title VII as well as Section 1981 where Congress has evidenced an intent to protect an employee's right to do both.[19]

[18] While the applicable statute of limitations is a state statute, the rules with respect to which statute should be applied and the circumstances under which that statute should be tolled are federal rules. The rules adopted should be those which best serve the policies expressed in the federal statutory scheme. *Macklin* v. *Spector Freight Systems, Inc., supra,* 476 F.2d at 994-95 n. 30. *Cf. Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 239-40 (1969).

[19] See *Alexander* v. *Gardner-Denver Co., supra,* 39 L.Ed.2d at 158 & n. 7, 9.

In *American Pipe and Construction Co.* v. *Utah, supra,* this Court held that commencement of a class action tolled the running of the limitation period on actions by members of the purported class until the entry of the order that the suit could not proceed as a class action. A contrary holding would have induced potential class members to file protective motions to intervene or to join in the event that a class was later found unsuitable, breeding needless duplication of motions and depriving class actions of "the efficiency and economy of litigation which is a principal purpose of the procedure". *Id.*, 414 U.S. at 553. In the case at bar, failure to adopt a tolling rule will require employees, who wish to proceed under both Title VII and Section 1981, to file two separate actions, resulting in economic hardship to the plaintiffs and a further strain on judicial resources.

In *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973) the court, adopting the rule that the filing of an EEOC charge tolls the running of the period of limitation on a Section 1981 claim, reasoned as follows:

> "First, we believe Title VII indicates a recent congressional decision to favor informal methods of settlement and conciliation short of litigation in employment discrimination cases. Plaintiffs, who often proceed initially without assistance of counsel and bring their complaints first to EEOC in accord with this legislative policy, should not be penalized for this action when they later sue for relief in District Court under both Title VII and §1981, which overlaps Title VII. . . . Moreover, we believe the broad purpose of statutes of limitations—prevention of stale claims and unfair surprise—are not frustrated by adopting the rule of *Boudreaux* [v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir., 1971)] and *Reynolds* [v. *Daily Press, Inc.*, 5 CCH EPD ¶7991 (E.D. Va. 1972)]. The local and Spector were assuredly put on notice while the case

> was under investigation by the EEOC, for the investigator's report indicate that Spector's records were examined and officials of the local interviewed. . . . [W]e are not dealing with a clear expression of congressional intent as to limitations of §1981 actions, for Congress enacted no statute of limitations applicable to §1981. As a result we are forced to create procedural limitations on such actions as a matter of judicial implication. See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, [427 F. 2d 476, 488, (7th Cir.), *cert. denied* 400 U.S. 911 (1970)]; cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969). In this posture it is our duty to ensure that the procedural limitations we impose are consistent with §1981's underlying "humane and remedial" policy. *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 427-429 (1965). See *Mizell* v. *North Broward Hospital District*, 5th Cir., 427 F.2d 468, 473-474 (1970). And we believe the underlying policy of justice and interracial accommodation imbedded in §1981 is not furthered by enmeshing actions under the statute in technicalities that operate to the disadvantage of plaintiffs who have acted entirely in good faith by taking their claims initially to EEOC."

478 F.2d at 994-95 n. 30.

Other Courts, in reaching the same result, have focused on the desirability of avoiding duplication of litigation. *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972); *Reynolds* v. *Daily Press, Inc.*, 5 CCH EPD ¶991 at 6649-50 (E.D. Va., 1972).[20]

---

[20] See also, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 255 n. 130 (5th Cir. 1974); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex., 1972).

The Sixth Circuit's position conflicts in principle with its decision in *Schiff* v. *Mead Corp.*, 3 CCH EPD ¶8043 (1970) and with those decisions in the Fifth and Ninth Circuits and various district courts holding that the period of limitation for the commencement of proceedings under Title VII should be tolled for the period during which resolution through arbitration or through the National Labor Relations Board is attempted.[21]

Just as, in those cases, the tolling rule was invoked to encourage private settlement without litigation, see, e.g., *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), the rule should be applied to the instant case to encourage conciliation by the EEOC before resort to litigation.

[21] *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Wells* v. *Gainesville-Hall County Economic Opportunity Organization Inc.*, 5 CCH EPD ¶8541 (N.D. Ga., 1973; *Guerra* v. *Manchester Terminal Corp.*, *supra*.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals affirming the District Court's dismissal of petitioner's claim under 42 U.S.C. §1981 should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
ERIC SCHNAPPER
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMON & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103
Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

Supreme Court, U. S.
FILED
AUG 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR RESPONDENT REA EXPRESS, INC.

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
PETER G. WOLFE
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of the Case 1

ARGUMENT

I. No Statutory Basis Exists for Holding That the Statute of Limitations Applicable to an Action Under the Civil Rights Act of 1866 is Tolled by the Commencement of Proceedings Under the Civil Rights Act of 1964 When the Limitations Periods Therein Would Bar All Further Litigation Under That Act 3

II. The Tennessee Statute of Limitations Bars This Action 5

III. Petitioner's Policy Arguments for Extending a Federal Cause of Action Beyond That Specifically Granted in the Civil Rights Act of 1964 Do Not Provide a Jurisdictional Basis for Action by This Court 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 10

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 11

PAGE

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) 9
Auto Workers v. Hoosier Corp., 383 U.S. 696 (1966) .. 11

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952) 9
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 11
Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965) 6

Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972), *cert. denied*, No. 72-5128, 41 U.S.L.W. 3188 (U. S. October 10, 1972) 6

Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949) 9
Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118 (9th Cir. 1973), *cert. denied*, 414 U.S. 859 (1974) 4

Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972) 6
Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973) 9

Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973) 8
Johnson v. Ry. Express Agency, Inc., *cert. granted*, No. 73-1543, 42 U.S.L.W. 3666 (U. S. June 3, 1974) .. 1
Jones v. Bombeck, 375 F.2d 737 (3d Cir. 1967) 5

Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 91 S.W.2d 291 (1936) 7

PAGE

Lovejoy v. Ahearn, 223 Tenn. 562, 448 S.W.2d 420 (1969) 7

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 9
Mann v. Smith, 158 Tenn. 463, 14 S.W.2d 722 (1929) 7
Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942), *aff'd* 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 6

O'Sullivan v. Felix, 233 U.S. 318 (1914) 4

Parmer v. National Cash Register Co., 346 F. Supp. 1043 (S.D. Ohio 1972) 9

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 9

Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953) 9
Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) 9

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10

Williams v. Hollins, 428 F.2d 1221 (6th Cir. 1970) 7

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 8

Statutes:

Civil Rights Act of 1866, 42 U.S.C. §1981 ..... *passim*

PAGE

Civil Rights Act of 1866, 42 U.S.C. §1988 ..... 3, 5-6

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.* 11

Labor Management Relations Act, Section 301, 29 U.S.C. §185 10

Railway Labor Act, 45 U.S.C. §§151 *et seq.* 9

Tennessee Code Ann. §§28-101–28-115 7

Tennessee Code Ann. §28-301 7

Tennessee Code Ann. §28-304 6

Miscellaneous:

29 C.F.R. §1601.25b(d) 9

S. Rep. 415, 92d Cong., 1st Sess. (1971) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR RESPONDENT REA EXPRESS, INC.

Preliminary Statement

The opinions of the Court below are set forth in Petitioner's Appendix. References to such Appendix are cited with the suffix "a."

Statement of the Case

The question for which certiorari was granted is as follows (*Johnson* v. *Ry. Express Agency, Inc., cert. granted*, No. 73-1543, 42 U.S.L.W. 3666 (U.S. June 3, 1974)):

> "Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5,

> tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?"

As it stands, it is the law of this case that *all* of the applicable time limitation periods specified in Title VII of the Civil Rights Act of 1964 have expired, barring any further judicial proceedings. Thus, in reality, the question presented is whether, notwithstanding its great specificity in fixing limitation periods in Title VII of the Civil Rights Act of 1964, Congress intended that administrative procedures under that Act would have the effect of tolling limitation periods applicable under another civil rights statute, enacted almost 100 years earlier, despite the Congressional purpose of barring any further litigation under the Civil Rights Act of 1964. It is submitted, as shown in more detail in the argument which follows, that the contention advanced by petitioner is not consonant with the Congressional purpose but is, on the contrary, diametrically opposed to it. In such circumstances, any contention concerning supposed deficiencies in the statutory scheme must be addressed to Congress, not to the courts.

ARGUMENT

I.

No Statutory Basis Exists for Holding That the Statute of Limitations Applicable to an Action Under the Civil Rights Act of 1866 Is Tolled by the Commencement of Proceedings Under the Civil Rights Act of 1964 When the Limitations Periods Therein Would Bar All Further Litigation Under That Act.

Although this Court apparently has never directly ruled on the issue, a number of lower courts have held that the Civil Rights Act of 1866, 42 U.S.C. §1981, gives rise to an independent cause of action, separate and apart from the cause of action which arises under the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* The cases so holding are cited in footnote 8 of petitioner's brief herein.

Section 1981 of the Civil Rights Act of 1866 provides (42 U.S.C. §1981):

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The statute of limitations applicable to any cause of action accruing under Section 1981 is governed by 42 U.S.C. §1988. Section 1988 is mandatory in its language and in pertinent part provides:

"The *jurisdiction* in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced *in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect;* but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts* in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (Emphasis added.)

Cf. *O'Sullivan* v. *Felix,* 233 U.S. 318 (1914); *Griffin* v. *Pacific Maritime Ass'n,* 478 F.2d 1118 (9th Cir. 1973), *cert. denied,* 414 U.S. 859 (1974).

The decisions of the lower courts below establish that the time limitations for further litigation under Title VII of the Civil Rights Act of 1964 have fully expired for the purpose of this case (111a), and certiorari was not granted to review that question. Thus, the question is whether the administrative procedures of Title VII should be given a tolling effect on the time for commencing litigation under the 1866 Act, in effect retroactively amending a statute enacted almost 100 years previously, so that the time for

suing under the earlier Act is *even longer* than that which Congress provided in the 1964 Act for actions arising thereunder. We submit that this contention is directly contrary to the provisions of Section 1988, which are mandatory in nature, and specifically require that the jurisdiction exercised thereunder shall be "in conformity with the laws of the United States."

Further, this contention is inconsistent with the Report of the Senate Committee responsible for the 1972 amendments to Title VII which explained that "neither the . . . provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. 415, at 24, 92d Cong. 1st Sess. (1971).

The foregoing shows that there is no basis in federal law for extending the time of suit in actions under the Civil Rights Act of 1866 beyond that in which such actions might be brought prior to the enactment of the Civil Rights Act of 1964; the following section shows that there is no such basis under the law of Tennessee, the state in which the litigation arose.

II.

The Tennessee Statute of Limitations Bars This Action.

Section 1988 also provides that, to the extent federal law is lacking, state "common law" as modified by the constitution and statutes, "shall govern" (42 U.S.C. §1988).

The applicable state law is not limited to state *statutory* law. State *decisional* law also applies including state decisions on tolling. *Jones* v. *Bombeck,* 375 F.2d 737 (3d Cir.

1967); *Harrison* v. *Wright,* 457 F.2d 793 (6th Cir. 1972); *Duncan* v. *Nelson,* 466 F.2d 939 (7th Cir. 1972), *cert. denied,* No. 72-5128, 41 U.S.L.W. 3188 (U.S. October 10, 1972). Section 1988 specifically refers to state "common law" as modified by the constitution and statutes of the state in question. Federal courts therefore have applied state rules tolling statutes of limitations based on the filing of similar actions. *Momand* v. *Universal Film Exchange,* 43 F. Supp. 996, 1008-1010 (Wyzanski, J., D. Mass. 1942), *aff'd.* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967; *Butterman* v. *Steiner,* 343 F.2d 519 (7th Cir. 1965).

The applicable one-year Tennessee statute of limitations reads as follows (T.C.A. §28-304):

> "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, *brought under the federal civil rights statutes,* and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued. For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of a product and in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury." (Emphasis added.)

The Tennessee Code contains specific tolling provisions, none of which would permit tolling in this case.[1] Further, the Tennessee Code specifically forbids tolling unless expressly provided for therein. Section 28-301 of the T.C.A. provides:

> "All civil actions, other than those for causes embraced in chapter 2 of this title [Real actions] should be commenced after the cause of action has accrued, within the periods prescribed in this chapter, *unless otherwise expressly provided.*" (Emphasis added.)

In view of the specificity of these provisions, the Tennessee courts have held that the existence of related proceedings—which would be comparable to the EEOC proceedings in this case—does not constitute a basis for the tolling of the statute of limitations. *Lovejoy* v. *Ahearn,* 223 Tenn. 562, 448 S.W.2d 420 (1969); *Kitchen-Miller Co.* v. *Kern,* 170 Tenn. 10, 91 S.W.2d 291 (1936); *Mann* v. *Smith,* 158 Tenn. 463, 14 S.W.2d 722 (1929). Cf. *Williams* v. *Hollins,* 428 F.2d 1221 (6th Cir. 1970).

Thus, under Tennessee statutory and common law, there is no basis for tolling the statute of limitations applicable to a Section 1981 claim on the basis of pending EEOC proceedings.

---

[1] T.C.A. §§28-101–28-115.

III.

Petitioner's Policy Arguments for Extending a Federal Cause of Action Beyond That Specifically Granted in the Civil Rights Act of 1964 Do Not Provide a Jurisdictional Basis for Action by This Court.

The two statutes involved in this appeal were enacted nearly a century apart. Hence it cannot be contended that Congress had any plan of extending the remedies available under the Civil Rights Act of 1866 when it enacted Title VII of the Civil Rights Act of 1964, particularly when such extension would take the time periods available under the earlier Act far beyond those specifically provided in the comprehensive statutory plan set forth in the 1964 Act. Petitioner's attempts to create a federal policy argument therefore must fail, for such policy may be grounded only upon Congressional action. If, as petitioner contends, "Title VII contains too many procedural potholes" (Br. 9), that contention must be addressed to the Congress, not to the Courts.[2]

[2] Further, conciliation activities by the EEOC do not inherently require tolling. As the Court in *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971), pointed out:

> "Most §1981 cases, and in particular most class actions under §1981, will seek equitable relief. Obviously the availability of conciliation by the EEOC is a factor to be considered in the exercise of discretion in granting such relief.
>
> . . . There is ample scope, within the traditional bounds of discretion in the application of equitable remedies, for the district courts to develop on a case by case basis an accommodation between their jurisdiction under §1981 and the conciliation efforts of the Commission." (438 F.2d at 764.)

Both the Court below in the instant case and the Court in *Jenkins* v. *General Motors Corp.*, 354 F. Supp. 1040 (D. Del. 1973), relied on this concept in holding that the statute of limitations would not be tolled. Thus, the conciliation efforts of the EEOC can take place and yet employers will be able to rely on the appropriate state statutes of limitations to protect them against long-delayed and different Section 1981 claims.

Petitioner's comment that the EEOC did not issue a right-to-sue letter in a timely fashion (Br. 9), should be of no concern. The EEOC permits complainants to demand a right-to-sue letter within sixty days after a charge is filed. *Parmer* v. *National Cash Register Co.*, 346 F. Supp. 1043 (S.D. Ohio 1972); cf. *Henderson* v. *Eastern Freight Ways, Inc.*, 460 F.2d 258 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); 29 C.F.R. §1601.25b(d). Had petitioner thus secured a right-to-sue letter, he could have brought both a Section 1981 action and a Title VII action simultaneously and before the statutes of limitations applicable to such actions had run.

Each statute gives rise to different rights and contains different remedies—in short, each sets forth a wholly separate and independent statutory framework. *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 at 996 (D.C. Cir. 1973). Further, those two statutes are not the only bases of civil rights claims. The Railway Labor Act, 45 U.S.C. §§151 *et seq.*, which is applicable here, has long been held to give rise to an independent cause of action for racially discriminatory employment practices;[3] petitioner was required to utilize the compulsory arbitration provisions under the Railway Labor Act to protest his dismissal and other grievances involving his employment but did not do so,[4] and today almost all of the states have

[3] *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952).

[4] *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). It should be noted that if petitioner's dismissal from employment was without "just cause" he would have been entitled to reinstatement with back pay by an Adjustment Board, a form of compulsory labor arbitration, entirely apart from any burden of proving whether or not racial discrimination existed. Having

laws and procedures designed to eliminate discrimination in employment. Thus, if each of these disparate sources

---

been employed for several years, petitioner could not have been unaware of this possibility, yet chose not to avail himself of it. It would seem that a system of compulsory arbitration provided by Congress for the purpose of adjusting such disputes arising under the Railway Labor Act should, at a minimum, *first* be resorted to for whatever remedies it may provide, at no additional cost to those in petitioner's situation, so that the equally strong purpose of Congress in avoiding unnecessary litigation in such employment disputes can be given effect. The District Court below so held (102a), although the Circuit Court's decision was based on separate grounds, and certiorari was not granted on the Railway Labor Act question.

That result would seem especially appropriate in situations like the present case. Petitioner, *who seeks a continuation of the employment relationship* (13a), was discharged based upon a claim of insubordination for allegedly refusing to follow instructions to correct errors made in handling a customer's shipments (27a-29a), and there was a question of whether the employer's progressive discipline system, or the "common law of the shop," had been correctly applied (37a-39a), the very kind of dispute for which labor arbitration is given a preferred status under the law. Cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 581-582 (1960). Nothing in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 39 L. Ed.2d 147 (1974), cited by petitioner, is contrary to this point. Indeed that decision is consistent with the point for the following reasons:

1. In *Alexander*, labor arbitration previously *had* taken place pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

2. The Court spoke approvingly of the fact that there had been labor arbitration and of its potential for reducing the need for litigation and its therapeutic values (42 U.S.L.W. at 4220 and 4218, fn. 13).

3. As mentioned previously this case arises in the context of the Railway Labor Act which involves a system of *compulsory* arbitration, as distinguished from the voluntary arbitration system permitted under Section 301 of the LMRA, and therefore represents an *a fortiori* situation.

4. In *Alexander*, the Court quoted with approval from a memorandum introduced by Senator Joseph Clark, one of the sponsors of the bill which became Title VII, the following explanation: "nothing in Title VII or anywhere else in this bill affects the rights and obligations under the NLRA or the Railway Labor Act . . . . " (42 U.S.L.W. at 4217, fn. 9.)

of rights and remedies relating to civil rights, is to toll actions under the others, a seemingly endless pyramid of tolling could arise, fostering a multiplicity of overlapping administrative and court proceedings, and entirely undercutting the legislative purpose in creating limitation periods applicable to such actions.

Congress did not intend a uniform period of limitations applicable to Section 1981 as in cases under the Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.*, such as *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965). In a case similar to the instant case, the Court distinguished *Burnett*:

> "In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, we held that the bringing of a timely action under the Federal Employers' Liability Act in a state court, even though venue was improper, served to toll the statute of limitations contained in that Act. The primary underpinning of *Burnett*, however, is wholly lacking here. As the Court noted in that case, a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision. 380 U.S., at 434. Section 301 of the Labor Management Relations Act establishes no such policy of uniformity expressed in a national limitations provision." *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 708 (1966).

Unlike the situation in the two cases relied principally upon by petitioner—*Burnett* and *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974)—this is not a case in which abortive procedural difficulties caused tolling of the limitation periods applicable to procedures under the

same federal statute. Instead, this case involves a claim that although the statute of limitations under the same statute clearly *bars* further litigation, the procedures applicable under that statute nevertheless have the effect of prolonging the possibility of litigation under another statute enacted almost 100 years earlier. This contention is preposterous on its face, and should be rejected.

CONCLUSION

The judgment of the Court of Appeals affirming the District Court's decision should be affirmed.

August 19, 1974

Respectfully submitted,

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
PETER G. WOLFE
Of Counsel

Supreme Court, U. S.
FILED
AUG 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

BRIEF FOR RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL

JAMES L. HIGHSAW
HIGHSAW & MAHONEY
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036

Attorney for Respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local.

August, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	2
Argument	
I. Final Judgment Has Been Rendered With Respect To The Petitioner's Claims Against The Respondent Unions	11
II. The Running Of The Tennessee Statute Of Limitations Should Not Be Tolled By Petitioner's Filing Of A Charge Of Employment Discrimination With The Federal EEOC Under The Civil Rights Act Of 1964	12
Conclusion	17

Appendix "A".

INDEX TO CITATIONS

Cases:

Holliday v. Railway Express Co., Inc., 306 F.Supp. 898, 901 (N.D. Ga., 1969)	15
Johnson v. ITT-Thompson Industries, Inc., 323 F.Supp. 1259 (N.D. Miss., 1971)	15
Logan v. General Fireproofing Co., 309 F.Supp. 1096 (W.D. N.C., 1969)	15
Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir., 1973)	16
McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973)	13
Mendes, et al. v. Brotherhood of Railway and Airline Clerks, 353 F.Supp. 137, 141 (D.C. S.D. N.Y.), 471 F.2d 1370 (2nd Cir., 1973), *cert. den.* 411 U.S. 971, reh. den. 412 U.S. 963	5, 6

Page

Pellicer v. Brotherhood of Railway and Steamship Clerks, 118 F.Supp. 254 (D.C. S.D. Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912 3

Pullen v. Otis Elevator Co., 292 F.Supp. 715 (N.D. Ga., 1968) 15

Railway Express Agency, Inc. v. Brotherhood of Railway and Airline Clerks, 437 F.2d 388 (5th Cir., 1972), *cert. den.* 403 U.S. 919 (1972) 2

Rota, et al. v. Brotherhood of Railway, Airline and Steamship Clerks, 489 F.2d 998 (7th Cir., 1973), *cert. den.* 414 U.S. 1144 (1974) 5

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir., 1970) 15

Tipler v. E. I. duPont deNemours & Co., 443 F.2d 125 (6th Cir., 1971) 15

STATUTES:

Civil Rights Act of 1866 (42 U.S.C.A., Sec. 1981, et seq.) 2, 4, 11, 13, 14, 15, 16, 17

Civil Rights Act of 1964, Title VII (42 U.S.C.A., Sec. 2000e, et seq.) 3, 4, 7, 9, 11, 13, 15, 16

Interstate Commerce Act (49 U.S.C.A., Sec. 1, et seq.) 2

Railway Labor Act (45 U.S.C.A. Sec. 151, et seq.) 2, 3

Tennessee Code Ann. § 28-304 .....2, 9, 11, 12, 13, 14, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

BRIEF FOR RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL

OPINIONS BELOW

References to the opinions below are adequately set forth in petitioner's brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief.

STATUTES INVOLVED

This case involves the provisions of Section 1981 of Title 42 of the United States Code and Section 304 of Title 28 of the Tennessee Code. These statutory provisions are set forth in Appendix "A" to this brief.

QUESTIONS PRESENTED

This Court's order of June 3, 1974, granted the petition for a writ of certiorari limited to a single question which is set forth in petitioner's brief.

STATEMENT OF THE CASE

Petitioner is a Negro citizen of the United States and a resident of the State of Tennessee. He was an employee of respondent Railway Express Agency, Inc. (REA Express), from the spring of 1964 until June 20, 1967, when his employment was terminated by the company (16a-62a).[1] REA Express is a carrier engaged in the express transportation of property by railroad, truck and air. It is subject to the provisions of the Interstate Commerce Act (49 U.S.C.A., Sections 1, et seq.) and of the Railway Labor Act (45 U.S.C.A., Sections 151, et seq.). See: *Railway Express Agency, Inc.* v. *Brotherhood of Railway and Airline Clerks,* 437 F.2d 388 (5th Cir., 1972), *cert. den.* 403 U.S. 919 (1972).

While petitioner was an employee of REA Express, he was a member of respondent Lily of the Valley Local, a subordinate unit of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) (61a-63a, 88a). BRAC is the duly authorized representative

[1] Reference is to pages of the printed Appendix in this Court.

under the provisions of Section 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth) of most of the employees of REA Express. In 1952, BRAC and REA Express amended their collective bargaining agreement to fully integrate the seniority rights of REA Express members regardless of race. This integration was sustained by the Federal Courts. *Pellicer* v. *Brotherhood of Railway and Steamship Clerks,* 118 F.Supp. 254 (D.C.S.D. Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912.[2] It was under this seniority system that petitioner became an employee of REA Express in 1964. Under this seniority system he was able to bid for any job within his seniority district for which he was qualified. His employment began as a freight handler and he bid for and obtained a job as a driver of REA Express vehicles in the Memphis area. He was holding this job when his employment was terminated by the carrier (86a-89a). On May 31, 1967, petitioner and six other black employees of REA Express at Memphis filed a charge with the Federal Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Sections 2000e, et seq.) against REA Express and the two respondent local unions alleging discrimination against the charging parties because of their race (15a). The EEOC investigator made no contact with any officer of the respondent unions. Instead, he queried only local officials of the carrier with respect to the unions (29a-30a). On the basis of this hearsay information,

[2] The validity of this integration was also recently sustained in a case under Title VII of the Civil Rights Act of 1964. *Barbour* v. *REA Express, et al.* (Civil Action No. 72-235, D.C. N.D. Ala. S.D., decided October, 1973), not reported.

an investigative report was issued on December 22, 1967 (14a). This report showed, among other things, that at that time the petitioner had obtained as legal counsel Mr. Lewis R. Lucas of the law firm of Ratner, Thomson, Sugarmon, Lucas & Willis of Memphis who wished to be informed of any contact made with petitioner (31a, 32a). On March 31, 1970, the EEOC issued a decision finding reasonable cause to believe that "respondent had violated Title VII of the Civil Rights Act of 1964, and that on or about January 15, 1971, petitioner received from EEOC a notice of his right to bring suit within 30 days" (Pet. Br., 3).

No complaint was filed pursuant to the right-to-sue letter until the filing of the original complaint in Civil Action No. C-71-66 in the United States District Court for the Western District of Tennessee at Memphis on March 18, 1971 (60a).[3] This complaint was filed by an attorney appointed by the District Court on February 12, 1971, at the request of petitioner (8a). The complaint invoked the jurisdiction of the Court under Title VII of the Civil Rights Act of 1964 and Sections 1981, 1982, 1983, and 1988 of Title 42 of the United States Code. Paragraph VI of the complaint alleged that the petitioner had been denied membership in BRAC Tri-State Local, that the respondent unions did not defend the rights of Negro members in the same manner as they defended the rights of white members, and that petitioner was denied equal labor representation because of his race (63a). The respondent BRAC locals filed an answer to the complaint setting forth various legal defenses and

[3] The filing date of "March 18, 1973" appearing in the printed copy of this complaint beginning at page 60a of the Appendix is in error.

denying the allegations of racial discrimination (67a-71a).

On May 11, 1971, respondent BRAC locals filed written interrogatories to be answered by petitioner. The petitioner's answers to these interrogatories showed that the complaint was entirely without merit (77a-90a). Interrogatory No. 39 requested information as to the specific acts of the respondent BRAC locals which the petitioner sought to enjoin. The answer set forth three alleged discriminatory acts. These were (1) an alleged practice of discrimination in charging higher dues for black employees than for white employees; (2) alleged failure to give grievances of black employees proper and diligent consideration; and (3) failure to give black employees equal opportunity for advancement to supervisory positions. With respect to the dues claim, Article 27 of the BRAC Constitution provides a non-discriminatory dues structure unrelated to race. See: *Rota, et al.* v. *Brotherhood of Railway, Airline and Steamship Clerks,* 489 F.2d 998 (7th Cir., 1973), *cert. den.* 414 U.S. 1144 (1974). As to the grievance claim, petitioner at no time had ever requested either one of the respondent locals to prosecute any grievance on his behalf. In *Mendes, et al.* v. *Brotherhood of Railway and Airline Clerks,* 353 F.Supp. 137 (D.C. S.D. N.Y., 1973), District Judge Gagliardi granted BRAC summary judgment on a complaint alleging unfair handling of grievances by a plaintiff who had never submitted a grievance to the union for handling. In so doing, the District Court spoke as follows (page 141):

> "The facts underlying Evenger's suit are even less persuasive. Evenger joins Mendes in alleging unfair representation of his grievances

> concerning job abolishment, promotions and overtime and, in all but the first matter, he has not even submitted a grievance to his union. The question posed is obvious: how can a member accuse his collective bargaining agent of unfair representation when he fails to inform his agent that he is aggrieved? The answer is likewise self-evident. He cannot."

This decision was affirmed on appeal by the Second Circuit, 471 F.2d 1370 (1973), on the basis of the District Court's opinion, and a petition for certiorari was denied by this Court, 411 U.S. 971, petition for rehearing denied, 412 U.S. 963. Moreover, the petitioner did not cite any other black employee who had a grievance not prosecuted (62a, 63a, 92a).[4]

Likewise the claim concerning supervisory positions was not supported. Petitioner answered that he had no knowledge of any white employee provided training for supervisory positions with REA Express. The allegation in the complaint also related solely to the carrier and not to the respondent unions with respect to which REA Express obtained summary judgment (63a, 91a). Supervisory positions are, with a few exceptions, non-contract positions which are filled without reference to any union contract.

BRAC filed a motion to dismiss the original complaint, which was designated a "supplemental complaint", or in the alternative for summary judgment (72a). REA Express filed a similar motion (92a). On June 14, 1971, the District Court, after argument on the motions, granted the motion of the respondent BRAC locals for summary judgment on the grounds that on the basis of the undisputed facts petitioner had no grounds for relief against said respondents under the Civil Rights Act of 1964. The Court also found that insofar as petitioner sued under statutes other than the Civil Rights Act of 1964 such claims were dismissed because of failure to comply with the applicable Tennessee statute of limitations. The Court also granted REA Express summary judgment with respect to the petitioner's claim of alleged discrimination with respect to providing training for supervisory positions (92a).

The petitioner did not appeal the order of the District Court which eliminated the BRAC locals from the case. On January 14, 1972, the District Court granted the motion of petitioner's attorney to be relieved of his representation. Under the direction of the Court, the Clerk advised petitioner in writing of this action and he was allowed 30 days from January 14, 1972, to obtain other counsel or his case would be dismissed without prejudice. The 30 days went by without the Court hearing anything from petitioner and on February 15, 1972, the District Court entered an order "that this action be and the same is hereby dismissed without prejudice" (47a-48a).

The petitioner took no appeal from this order. Two days after the entry of the order of February 15, 1972, attorney William E. Caldwell wrote Chief Judge Bailey Brown of the District Court stating that petitioner had contacted counsel, that counsel was unable to represent petitioner because of the apparent discovery

---

[4] The petitioner did not mention in the answers to interrogatories the claim in his complaint that he had been denied membership in BRAC Tri-State Local. However, the answers of petitioner to the interrogatories of the BRAC locals—questions nos. 7, 8, 9, 10, and 15—show that petitioner never sought membership in the Tri-State Local and had no knowledge of any by-law or rule barring him from such membership (77a-87a).

expense that would be involved, that counsel had agreed to seek financial support for petitioner, and that if such support could be obtained, counsel would be willing to represent him. The letter concluded by stating that although counsel did not represent petitioner he had agreed to ask the Court to grant an additional 30 days to secure legal representation (45a). No further action was taken until May 5, 1972, when Mr. Caldwell again wrote to Chief Judge Brown stating that financial support had been obtained, that counsel was now prepared to represent petitioner, and requested that the dismissal order of February 15, 1972, be vacated and that the cause be reinstated on the docket of the Court. This letter spoke only of the action of the petitioner against the carrier REA Express and made no mention of the respondent unions (49a). Chief Judge Brown responded that since the old action had long since been dismissed the proper way to handle the matter would be the filing of a new action (51a).

Thereafter, on May 31, 1972, petitioner filed a second complaint against both REA Express and the respondent unions which contained substantially the same allegations as the complaint with respect to which the respondent BRAC locals had been granted summary judgment on June 14, 1971 (4a). The BRAC locals filed a motion to dismiss this new complaint or in the alternative for summary judgment on the grounds that the District Court's order of June 14, 1971, was *res judicata* with respect to the claims asserted in the new complaint and that such claims were barred by that order. Subsequently, the respondent BRAC locals amended the motion to include as grounds for dismissal of the new complaint the absence of jurisdiction of the Court of the subject matter thereof because the new complaint did not conform to the requirements of Section 706(e) of the Civil Rights Act of 1964 (94a-97a). REA Express filed a similar motion (94a).

Petitioner opposed these motions by brief and in oral argument before the District Court. Petitioner made no contention to the District Court that the Tennessee statute of limitations applied by the Court in its order of June 14, 1971 (Section 304 of Title 28 of the Tennessee Code), to petitioner's claims under civil rights statutes other than Title VII of the Civil Rights Act of 1964 was tolled by reason of a filing of a charge with the Federal EEOC pursuant to Section 706 of the 1964 Act. Petitioner's arguments to the District Court on the application of the Tennessee statute of limitations were limited to the contentions that the wrong statute had been applied. On January 25, 1973, the District Court issued its opinion and order granting the motions of the carrier and of the respondent BRAC locals (98a-104a).

The judgment of the District Court was affirmed by the Court of Appeals for the Sixth Circuit. In its original opinion, the Court of Appeals did not specifically deal with the action of the District Court with respect to its holding that the order of June 14, 1971, was *res judicata* with respect to the claims of the petitioner against the respondent locals. The obvious reason was that the petitioner all but abandoned any argument he had on this point as his brief to the Court of Appeals contained only two short paragraphs dealing with the issue in cursory fashion. However, the Court of Appeals did specifically deal with and reject the argument of the petitioner to the Court that the Tennessee statute of limitations was tolled by the filing of a charge with the Federal EEOC

(105a-113a). Moreover, in its opinion and order on rehearing the Court of Appeals specifically affirmed the holding of the District Court that the respondent BRAC locals had a complete defense to the second complaint on the grounds of *res judicata*. The holding of the Court of Appeals on this issue reads as follows (115a):

> "The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. *We agree with the District Court that the unions have a complete defense on the ground of res judicata,* and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned." (Emphasis supplied).

As a consequence, the petition for certiorari set forth as one of the questions for review the following issue (Pet., page 3):

> "As to his causes of action under either statute,[5] an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect."

This Court granted the petition for certiorari only with respect to the issue of the tolling of the application

[5] In the context of the petition the reference is to Section 1981 of Title 42 of the United States Code and Title VII of the Civil Rights Act of 1964. It should also be observed that the statement of petitioner that the motion of the respondent BRAC locals for summary judgment was unopposed was incorrect. The District Court's order of June 14, 1971, specifically states that the motion was granted upon consideration and after argument of counsel (92a).

of the Tennessee statute of limitations to an action under Section 1981 by the filing of a charge with the EEOC under Title VII of the Civil Rights Act of 1964.

ARGUMENT

I

Final Judgment Has Been Rendered With Respect to the Petitioner's Claims Against the Respondent Unions

The District Court granted the motion of the respondent BRAC locals to dismiss the second complaint or for summary judgment thereon on the grounds that the Court's order of June 14, 1971, was *res judicata* with respect to the claims of the petitioner against these respondents set forth in said second complaint (101a). The Court of Appeals affirmed this holding stating that "We agree with the District Court that the unions have a complete defense on the grounds of res judicata" (115a). The petitioner in his petition for certiorari asked this Court to review this holding of the Court of Appeals. This Court denied this request by limiting its grant of the petition to the single issue of the tolling of the Tennessee statute of limitations. In his brief the petitioner states that the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification. The reason given for this contention in footnote 7 on page 8 of the brief is that the order of summary judgment was interlocutory and was limited to petitioner's Title VII claims. However, the claims of petitioner under both statutes were identical as the decision of the Court of Appeals recognized when it said that the District Court's order of June 14, 1971, constituted a complete defense for the respondent unions to petitioner's claims. Petitioner himself also recognized this fact

by asking the Court to review this judgment in his petition for certiorari and described the judgment as a "ruling of the court below affirming the dismissal of * * * (c) petitioner's claims, under both statutes, against the unions and, as to failure to train, against REA, on the ground of *res judicata* * * *" (Pet., page 12).

The denial by this Court of the petition for certiorari on the *res judicata* issue constitutes a final judgment in the case in favor of the respondent BRAC locals.

II

The Running of the Tennessee Statute of Limitations Should Not Be Tolled by Petitioner's Filing of a Charge of Employment Discrimination with the Federal EEOC Under the Civil Rights Act of 1964

The petitioner was discharged from employment by the carrier on June 20, 1967. His original complaint was filed with the United States District Court for the Western District of Tennessee on March 18, 1971, or approximately three years and nine months later. This was long after the limitation provided by the applicable Tennesse statute of limitations. The second complaint, upon which the petitioner now wishes to proceed, was not filed until May 31, 1972, or almost five years after the petitioner's employment with the carrier ceased.

Petitioner filed his charge with the EEOC on September 6, 1967.[6] Petitioner's brief (pp. 9, 10) argues that if the applicable Tennessee statute of limitations was not deemed tolled by the filing of this charge, petitioner would have had to file suit under Section 1981

[6] The original charge was filed on May 31, 1967, but was amended on September 6, 1967.

without waiting for the resolution of his charge to the EEOC. Petitioner argues that this would be unfair because Title VII is in some instances a better remedy under which to litigate employment discrimination claims. However, a holding that the Tennessee statute of limitations was not deemed tolled by the filing of the EEOC charge does not mean that the petitioner could not have taken advantage of Title VII to litigate his employment discrimination claims. Under the statute as it stood at the time the original complaint was filed in this case, an individual who had filed a charge with the EEOC of employment discrimination could request a right-to-sue letter when that charge had been pending for 60 days before the EEOC.[7] As a practical matter, a substantial part of all litigation under Title VII has been based upon such right-to-sue letters without any processing of the charge by the EEOC. Indeed, it has become a matter of public knowledge that the channels of EEOC are clogged with so many thousands of charges of discrimination in employment practices that it is impossible for it to deal with these charges within the time limits provided by the statute. This court in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), limited the legal prerequisites to the bringing of a Title VII action to the filing of an EEOC charge and a right-to-sue letter. Thus, the tolling of the state statute of limitations with respect to a Section 1981 action is neither legally nor practically necessary in order to bring a Title VII action.

Petitioner's brief (pp. 11, 12) also argues that from the point of view of an individual with limited re-

[7] Under the amendments effective March 24, 1972, an individual is entitled to such a right-to-sue letter after a period of 180 days.

sources it is more desirable to file a charge under Title VII and thus have made available to him the full resources of the EEOC than to commence litigation under Section 1981. The fact that the statute recognizes the need to bring suits without the EEOC fully processing discrimination charges and the fact that a substantial number of such suits are brought substantially weakens this argument. However, in the case of this particular statute of limitations, there is a whole year period during which Title VII relief can be undertaken and under other state statutes the period is longer. Nor is the only public interest involved the interest of a person claiming employment discrimination. The public interest bases of statutes of limitations is to require the prompt and orderly processing of claims before they have become stale. It is not in the interest of individuals claiming employment discrimination or in the public interest to establish a rule of law which permits the processing of stale claims. Yet, it is clear that this would be the practical effect of petitioner's position. In the present case, even if the original complaint had gone to trial on February 2, 1972, as scheduled, the petitioner's claim would have been before the Court almost five years after the events took place. The need to process employment discrimination claims before they become stale is recognized by Title VII itself by authorizing individuals to seek a right-to-sue letter after the expiration of a period of time which was originally two months and now extends to six months. With the well established log jam which exists with respect to the processing of employment discrimination claims before the EEOC, the petitioner's position would mean even longer periods of time would elapse before a claim was brought to Court.

The petitioner's argument that the filing of the EEOC charge meets the policies underlying statutes of limitations of fairness to defendants with respect to stale claims by providing notice is wholly without merit. In the first place, Federal Courts have consistently held that the claims set forth in a Title VII Court complaint are not limited to those contained in the EEOC charge. *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970); *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir., 1971). This means that a defendant, as a practical matter, may not have notice of what will ultimately be the essence of the Court complaint. Second, under the 1972 amendments to Title VII the EEOC is no longer required to serve copies of charges upon respondents so that all that the respondent receives is a notice that a charge of discrimination has been filed. Third, there are decisions holding that a Title VII complaint can proceed in a Federal Court even if the respondent is never served at all. *Johnson* v. *ITT-Thompson Industries, Inc.*, 323 F.Supp. 1259 (N.D. Miss., 1971); *Pullen* v. *Otis Elevator Co.*, 292 F.Supp. 715 (N.D. Ga., 1968); *Holliday* v. *Railway Express Co., Inc.*, 306 F.Supp. 898, 901 (N.D. Ga., 1969); *Logan* v. *General Fireproofing Co.*, 309 F.Supp. 1096 (W.D. N.C., 1969). The filing of a Title VII charge clearly does not guarantee any kind of notice to a respondent.

The petitioner argues that the decision of the Court of Appeals not recognizing the tolling of the state statute of limitations is incompatible with the flexible approach to overlapping remedies in employment discrimination cases and if allowed to stand would interfere substantially with the successful administration of Title VII. However, the fact is that Section

1981 is commonly thrown into complaints based on Title VII principally for the purpose of avoiding defects in the complaint arising out of failure to comply with one or more of the requirements of Title VII. Such is the present case. It would be a rare case, if any, in which a Section 1981 action was based upon some facts other than those involved in the Title VII claim. This is clearly demonstrated by the present case. Petitioner's whole argument is simply an effort to keep alive claims which have been dismissed by the District Court under Title VII, affirmed by the Court of Appeals, and which this Court refused to review on a petition for certiorari. Thus, the use which would be made of a ruling tolling the application of a state statute of limitations to a Section 1981 action would be the further encouragement of litigation of stale claims, not advancement of the purposes of Title VII.

Petitioner also cites the decision in *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (1973), to support an argument that the tolling principle should be recognized in the situation here involved to carry out the Congressional policy in Title VII of favoring informal methods of settling and conciliation. Such undoubtedly was the purpose of Congress in enacting Title VII. However, this principle has been more honored in the breach than it has been applied. The statute itself discourages conciliation by allowing petitioners to request right-to-sue letters after a minimum lapse of time. The 1972 amendments to the statute discourage conciliation by not requiring the charge to be served on the respondent. The decisions applying Title VII holding that conciliation is not a legal requirement for a suit discourage conciliation. Title VII has become not much more than a vehicle for filing a charge and

after a minimum length of time requesting a right-to-sue letter. Finally, conciliation is impossible in a substantial number of cases because the clogged docket of the EEOC prevents it from getting that far. A decision supporting the petitioner's position on tolling will not change any of these decisions or any of these problems, all of which have combined to make the Congressional objective of conciliation almost meaningless.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the judgment of the Court of Appeals on the issue of tolling the Tennessee statute of limitations with respect to petitioner's claim under Title 42, Section 1981, of the United States Code should be affirmed.

Respectfully submitted,

JAMES L. HIGHSAW
HIGHSAW & MAHONEY
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036
Attorney for Respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local.

August, 1974

APPENDIX

APPENDIX A

1. Provisions of Section 1981 of Title 42 of the United States Code:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Provisions of Section 304 of Title 28 of Tennessee Code:

> **28-304. Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.**—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued. For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of a product. The preceding sentence shall not apply to causes of action accruing prior to May 20, 1969. [Code 1858, § 2772 deriv. Acts 1715, ch. 27, § 5); Shan., § 4469; mod. Code 1932, § 8595; Acts 1967, ch. 283, § 1; 1969, ch. 28, § 1; 1969, ch. 293, §§ 1, 2.]

Supreme Court, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR PETITIONER

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMAN & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

TABLE OF CONTENTS

PAGE

I Federal Law Governs the Determination of Whether the Statute of Limitations Should be Tolled 1

II The Determination of Congress to End Discrimination in Employment, Its Preference for Conciliation and Its Intention to Preserve the Right of Action Under Section 1981 Can Best be Reconciled by Adopting the Tolling Rule Urged by Petitioner 4

III The Issue of Whether Petitioner's Section 1981 Claims Against Respondent Locals Are Barred by the Doctrine of *Res Judicata* Should be Remanded to the Court of Appeals 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Alexander v. Gardner Co., 39 L.Ed. 147 (1974) 5

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 3

Atkins v. Schmutz Manufacturing Company, 435 F.2d 527 (4th Cir. 1970) (*en banc*), *cert. denied*, 402 U.S. 932 (1971) 2

Boudreaux v. Baton Rouge Marine Construction Co., 437 F.2d 1011 (5th Cir. 1971) 4

PAGE

Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965) 3
Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958) .. 2

Cates v. Trans World Airlines, Inc., 8 CCH EPD ¶9755 (S.D.N.Y., October 1, 1974) 5
Chamberlain v. Brown, 442 S.W. 2d 248 (1969) 3

Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) 2

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) 3, 4

Hanna v. Plumer, 380 U.S. 460 (1965) 2
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 2

Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965) 2

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C Cir. 1973) 4
Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961) 2

Other Authorities

Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, November 1972 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR PETITIONER

Petitioner submits this brief in reply to the briefs for respondent REA Express, Inc., and respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local.

I

Federal Law Governs the Determination of Whether the Statute of Limitations Should be Tolled.

Respondent REA Express, Inc., erroneously contends that whether the period of limitations on petitioner's Section 1981 action was tolled by his filing of an EEOC charge

is controlled by Tennessee's statutory and decisional law (REA Br. 5-7).[1] The principle is well established that when federal courts sit to enforce federally-created rights, they look to federal law to determine the circumstances under which a state statute of limitations should bar the action. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Janigan* v. *Taylor*, 344 F.2d 781 (1st Cir. 1965); *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80 (2d Cir. 1961), *cert. denied* 368 U.S. 821 (1961). Even in diversity litigation, questions which are a matter of federal concern are answered by reference to federal law. *Hanna* v. *Plumer*, 380 U.S. 460 (1965); *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958); *Atkins* v. *Schmutz Manufacturing Company*, 435 F.2d 527 (4th Cir. 1970) (*en banc*), *cert. denied*, 402 U.S. 932 (1971). In *Atkins* v. *Schmutz Manufacturing Company*, *supra*, the court held that the tolling effect of the pendency of an identical suit in another federal court is to be determined as a matter of federal, rather than state law, pointing out that the state tolling rule, born of state court institutional considerations, has no relevance in the context of the federal system, 435 F.2d at 538 n.48.

Judge Friendly's rationale, in *Moviecolor Limited* v. *Eastman Kodak Company*, *supra*, for applying federal law in determining the tolling effect of concealment is equally applicable to the case at bar:

[1] The cases cited by REA in support of this proposition (REA Br. 5-6) involve the suspension of state statutes of limitations during periods of incarceration or other disability and the applicability of state savings statutes, matters with respect to which there are no federal "affirmative countervailing considerations". *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958). See *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80, 83-84 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1961).

> Plainly Congress did not deem complete nation-wide uniformity of limitations essential in such cases, else it would have provided its own period, . . . But we still must endeavor to determine whether, on the narrower issue of the effect of the wrongdoer's concealment, [or, in the instant case, the effect of the filing of an EEOC charge] Congress would have preferred uniformity among the federal courts with respect to the right it had created, a uniformity favorable to recoveries by plaintiffs, or uniformity as between the treatment of this right in federal courts and of rights of a related conceptual character in the courts of the state where the federal court sits.
>
> We think the former, at least where, as here, the right not merely is federally created but is enforceable only in the federal courts.

288 F.2d at 84.

In *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424 (1965), this court suggested that in deciding whether a Congressionally imposed time-limit should in a given circumstance be tolled the proper question is whether Congressional purpose will thus be effectuated. See also, *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *A fortiori*, this approach would be proper in dealing with a state statute of limitations, particularly where, as here, the state statute evidences hostility to the enforcement of the federally created rights.[2] *Guerra* v. *Manchester Terminal*

[2] The Supreme Court of Tennessee has held that Tennessee courts should not entertain actions brought under federal civil rights acts. *Chamberlain* v. *Brown*, 442 S.W.2d 248 (1969). Hence, as in *Moviecolor*, no purpose would be served by applying state tolling rules to actions seeking to enforce rights guaranteed by these acts.

Corp., 498 F.2d 641, 649-50 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 n.30 (D.C. Cir. 1973).

II

The Determination of Congress to End Discrimination in Employment, Its Preference for Conciliation and Its Intention to Preserve the Right of Action Under Section 1981 Can Best be Reconciled by Adopting the Tolling Rule Urged by Petitioner.

The contention of respondents that the tolling of the state statute of limitations is "unnecessary" because petitioner could have brought suit under Title VII as well as Section 1981 within the one-year period provided by Tennessee Code Ann. §28-304 by requesting a right-to-sue letter from the EEOC[3] is completely unresponsive to petitioner's principal point, namely, that he should have been allowed to invoke the resources of the EEOC, including its investigatory and conciliatory processes, before resorting to litigation (Pet. Br. 10-11).

In *Guerra* v. *Manchester Terminal Corp., supra,* (5th Cir. 1974), the Fifth Circuit Court of Appeals recently reaffirmed its previous decision[4] that the filing of a charge with the EEOC tolls the running of the statute of limitations applicable to actions brought under 42 U.S.C. §1981, stating:

> The determination that attempts to invoke the assistance of the EEOC should toll the §1981 limitations period rested on our recognition that Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination. We could find no expression of legislative intention to preempt or repeal §1981, and in fashioning a means of reconciling the two statutes we eschewed jurisdictional election or exhaustion of remedies doctrines. On the other hand, by using a tolling rule we could implement Title VII's policy of encouraging adjustment and settlement of grievances short of courtroom litigation through use of an administrative body with a developing expertise in problems of employment discrimination, while at the same time preserving intact the recently revivified remedy of §1981.

498 F.2d at 650. Accord: *Cates* v. *Trans World Airlines, Inc.*, 8 CCH EPD ¶ 9755 (S.D.N.Y. October 1, 1974).

Petitioner submits that the best, and perhaps the only, way to effectuate, on the one hand, Congress' clearly expressed preference for administrative proceedings,[5] and, on the other, its no less clearly expressed intention to preserve for the individual his right of action under Section 1981[6] is

[3] REA Br. at 9 n.2; BRAC Br. at 13.

[4] *Boudreaux* v. *Baton Rouge Marine Construction Co.*, 437 F.2d 1011, 1017 n.16 (5th Cir. 1971).

[5] The section-by-section analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972 as finally enacted, prepared by Senators Williams and Javits, states:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the office of the EEOC or the Attorney General, as appropriate. However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

Legislative History of the Equal Employment Opportunity Act of 1972, Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, November 1972, at 1847. See also, *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed.2d 147, 156 (1974).

[6] In the Senate debate on Senator Hruska's proposed amendment making Title VII the exclusive remedy for employment discrimination, Senator Javits pointed out:

by tolling the running of the statute of limitations on the latter during the pendency of the former.

III

The Issue of Whether Petitioner's Section 1981 Claims Against Respondent Locals Are Barred by the Doctrine of *Res Judicata* Should be Remanded to the Court of Appeals.

By order entered June 14, 1971, the District Court in petitioner's first suit (No. C-71-72) granted summary judgment to the respondent BRAC locals "on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964" (92a). The District Court in petitioner's second suit (No. C-72-183) held that petitioner's claim against respondent locals was barred by the doctrine of *res judicata* (101a). The Court of Appeals, in its original decision, did not reach this issue, but, in its opinion denying rehearing stated in a footnote its agreement with the District Court (115a).

> One other aspect of the matter which is cut off [by the exclusive remedy amendment] is the possibility of using civil rights acts long antedating the Civil Rights Act of 1964 in a given situation which might fall, because of the statute of limitations or other provisions, in the interstices of the Civil Rights Act of 1964. This is rather infrequent, but it is a valuable protection.
>
> . . . The idea is to enforce the law and not let people drop between two stools where they are actually violating the law.

Legislative History, supra, at 1400.

Senator Williams, in the same debate, added:

> [T]he courts have specifically held that Title VII and the Civil Rights Acts of 1866 and 1871 are not mutually exclusive, and must be read together to provide alternative means to redress individual grievances.

Id. at 1403.

In his Petition for a Writ of Certiorari, petitioner presented the question of whether, as to his causes of action under either Title VII or Section 1981, an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect (Pet. at 3). Respondent locals contend that this Court's denial of certiorari on this question constitutes a final judgment in favor of the respondent locals (BRAC Br. at 12; BRAC Reply Br. at 2-3). To the contrary, it is apparent from the record that petitioner's Section 1981 claims against the locals have never been decided on the merits.

Respondent BRAC locals' motion for dismissal or summary judgment in the first suit was based entirely on procedural grounds (72a-73a). In view of the fact that the record on which the District Court granted the motion contained undisputed evidence that the BRAC locals were segregated and that dues in the black local were higher than dues in the white local,[7] both of which are clearly violative of Section 703(c) of Title VII (42 U.S.C. §2000e-2(c)) the granting of summary judgment to the BRAC locals must have been on procedural grounds not applicable to Section 1981.

The Court of Appeals' noting, in its opinion denying rehearing, that it agreed with the District Court on the *res judicata* issue does not constitute such a carefully considered judgment on a highly technical and critical issue that it should have the effect of a final disposition. It is respectfully submitted that should petitioner prevail on

---

[7] Interrogatories No. 1 of Defendants Tri-State Local, etc. to Plaintiff Willie Johnson, Nos. 3 and 25 (78a, 81a-82a) and answers thereto (86a, 88a).

the tolling issue, the *res judicata* issue should be remanded to the Court of Appeals for reconsideration and clarification.

CONCLUSION

For the reasons set forth in petitioner's main brief and hereinabove, Congressional policy as reflected in Section 1981 and Title VII, and federal concerns with respect to the efficient functioning of the federal courts, would best be served by holding that the filing of petitioner's EEOC charge tolled the running of the state statute of limitations applicable to his cause of action under 42 U.S.C. §1981 and that the statute of limitations did not begin to run again until he received his notice of right to bring suit from the EEOC.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MORRIS J. BALLER
DEBORAH M. GREENBERG
10 Columbus Circle
Suite 2030
New York, New York 10019

WILLIAM E. CALDWELL
RATNER, SUGARMAN & LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

Attorneys for Petitioner

LOUIS H. POLLAK
Of Counsel

Supreme Court, U. S.
FILED
OCT 10 1974
MICHAEL RODAK, JR., CLERK

No. 73-1543

In the Supreme Court of the United States

OCTOBER TERM, 1974

WILLIE JOHNSON, JR., PETITIONER

v.

RAILWAY EXPRESS AGENCY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
KEITH A. JONES,
Assistant to the Solicitor General,
DAVID L. ROSE,
MICHAEL A. MIDDLETON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILLIAM A. CAREY,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
CHARLES L. RIESCHEL,
CHARLES S. P. HODGE,
Attorneys,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Introduction and summary of argument	7
Argument:	
A. The congressional purpose is effectuated by permitting an individual aggrieved by employment discrimination to delay bringing suit under Section 1981 until after issuance of the notice of his right to sue under Title VII	9
1. An individual aggrieved by employment discrimination may reasonably desire to assert claims for relief under both Section 1981 and Title VII	9
2. Congress did not intend to compel an aggrieved individual to sue under Section 1981 prior to completion of the Commission's efforts to obtain voluntary compliance	14
B. The running of the limitation period for bringing suit under Section 1981 serves no purpose during the pendency of timely Title VII charges based upon the same factual allegations	18
Conclusion	22

CITATIONS

Cases:	
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	10, 11, 15
American Pipe & Construction Co. v. *Utah*, 414 U.S. 538	8, 19, 20, 21
Auto Workers v. *Hoosier Corp.*, 383 U.S. 696	7
Baker v. *Chicago Fire and Burglary Detection, Inc.*, 489 F. 2d 953	13
Berry v. *Pacific Sportfishing, Inc.*, 372 F. 2d 213, certiorari denied, 389 U.S. 821	21

559-883—74——1

Cases—Continued

	Page
Boudreaux v. *Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011	21–22
Brady v. *Bristol-Meyers, Inc.*, 459 F. 2d 621	12
Brown v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377, certiorari denied, 409 U.S. 982	12
Burnett v. *New York Central R. Co.*, 380 U.S. 424	19, 20, 21
Caldwell v. *National Brewing Co.*, 443 F. 2d 1044, certiorari denied, 405 U.S. 916	12, 14
Caperci v. *Huntoon*, 397 F. 2d 799, certiorari denied, 393 U.S. 940	13
Crown Coat Front Co., Inc. v. *United States*, 386 U.S. 503	16
Culpepper v. *Reynolds Metals Co.*, 421 F. 2d 888	21
Drew v. *Liberty Mutual Insurance Co.*, 480 F. 2d 69, certiorari denied, June 3, 1974, No. 73-312	15
Equal Employment Opportunity Commission v. *Chromcraft Corp.*, 465 F. 2d 745	16
Franks v. *Bowman Transportation Co.*, 495 F. 2d 398	7
Guerra v. *Manchester Terminal Corp.*, No. 73-1907, decided July 31, 1974	13
Henderson v. *First National Bank of Montgomery*, 344 F. Supp. 1373	16
Holmberg v. *Armbrecht*, 327 U.S. 392	17
Howard v. *Lockheed-Georgia Co.*, 372 F. Supp. 854	11
Humphrey v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832, reversed on other grounds, 488 F. 2d 691	11
Jackson v. *Statler Foundation*, 496 F. 2d 623	12
Jones v. *Alfred Mayer Co.*, 392 U.S. 409	12, 13
Long v. *Ford Motor Co.*, 496 F. 2d 500	12, 14–15
Loo v. *Gerarge*, 374 F. Supp. 1338	11
Macklin v. *Spector Freight Systems, Inc.*, 478 F. 2d 979	12, 21
Madison v. *Wood*, 410 F. 2d 564	7
Malone v. *North American Rockwell Corp.*, 457 F. 2d 779	21
Mansell v. *Saunders*, 372 F. 2d 573	13
McAllister v. *Magnolia Petroleum Co.*, 357 U.S. 221	17
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	10
Moore v. *Fields*, 464 F. 2d 549	9
Moore v. *Sunbeam Corp.*, 459 F. 2d 811	21

Cases—Continued

	Page
Moviecolor Limited v. *Eastman Kodak Company*, 288 F. 2d 80, certiorari denied, 368 U.S. 821	17
Order of Railroad Telegraphers v. *Railway Express Agency, Inc.*, 321 U.S. 342	18
O'Sullivan v. *Felix*, 233 U.S. 318	7
Pierce v. *United States*, 146 F. 2d 84	13
Sanchez v. *Trans World Airlines, Inc.*, 499 F. 2d 1107	21
Stamps v. *Detroit Edison Co.*, 365 F. Supp. 87	11
Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. 229	14
Van Hoomissen v. *Xerox Corporation*, 368 F. Supp. 829	11
Waters v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476, certiorari denied, 400 U.S. 911	12, 15
Willingham v. *Macon Telephone Publishing Co.*, 482 F. 2d 535, rehearing *en banc* granted, 482 F. 2d 542	13
Young v. *International Telephone & Telegraph Co.*, 438 F. 2d 757	12, 14

Statutes:

Civil Rights Act of 1866, Section 1, 14 Stat. 27, as amended, 42 U.S.C. 1981	2, 5, 7, 8, 9, 11, 12, 13, 14, 16, 17, 21
42 U.S.C. 1982	12
42 U.S.C. 1988	8
Civil Rights Act of 1964, Title VII, 78 Stat. 259, as amended, 42 U.S.C. 2000e, *et seq.*:	
Section 701(b), 42 U.S.C. 2000e(b)	13
Section 706, 42 U.S.C. (1970 ed.) 2000e–5	2, 6
Section 706(b), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(b)	19
Section 706(d), 42 U.S.C. (1970 ed.) 2000e–5(d)	9
Section 706(e), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e)	10
Section 706(e), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e)	18
Section 706(f)(1), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f)(1)	5, 15
Section 706(g), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(g)	10
Section 706(k), 42 U.S.C. (1970 ed., Supp. II) 2000e–5(k)	10

Statutes—Continued	Page
Equal Employment Opportunity Act of 1972, Section 4, 86 Stat. 104	2
28 U.S.C. 1652	8
Tenn. Code Ann.:	
Section 28-106	8, 19
Section 28-304	7
Miscellaneous:	
29 C.F.R. 1602.14(a)	9
110 Cong. Rec. 7207 (1964)	14
118 Cong. Rec. 3371-3373 (1972)	11
H. Rep. No. 238, 92d Cong., 1st Sess.	11
Rule 54(b), Fed. R. Civ. P.	5
S. Rep. No. 238, 92d Cong., 1st Sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1543

WILLIE JOHNSON, JR., PETITIONER

v.

RAILWAY EXPRESS AGENCY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The opinion of the district court (Pet. App. 6a-12a) is not officially reported. The opinion of the court of appeals (Pet. App. 13a-21a) is reported at 489 F. 2d 525. The opinion of the court of appeals denying rehearing (Pet. App. 22a-26a) is reported at 489 F. 2d 530.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1973, and a petition for rehearing

was denied on January 15, 1974. The petition for a writ of certiorari was filed on April 15, 1974 and was granted on June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the running of the period of limitation for bringing an action for employment discrimination under 42 U.S.C. 1981 is tolled by filing with the Equal Employment Opportunity Commission a charge of unlawful employment practice based upon the same factual allegations.

STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, as amended, 42 U.S.C. 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 706 of the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. (1970 ed.) 2000e–5, provided in pertinent part:[1]

[1] Section 706 was amended, in ways not directly relevant to this litigation, by Section 4 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 104.

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. * * *
>
> * * * * * *
>
> (e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1)

by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

STATEMENT

In May 1967 petitioner, a black man, filed a charge with the Equal Employment Opportunity Commission alleging that his employer, respondent Railway Express Agency, Inc., discriminated on the basis of race in its hiring, assignment, training, transfer, and promotion practices, and that respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local maintained racially segregated local unions, all in violation of Title VII of the Civil Rights Act of 1964 (Pet. 5–6). Railway Express terminated petitioner's employment the following month (Pet. 6). Petitioner then

amended his charge to include an allegation of discriminatory discharge (*ibid.*).

In December 1967 the Commission filed a report concluding that Railway Express and the local unions had engaged in discriminatory practices, and in March 1970 the Commission issued a decision finding reasonable cause to believe petitioner's charges (*ibid.*). The Commission's conciliation efforts failed to bring respondents into voluntary compliance with Title VII, and in January 1971 the Commission accordingly issued petitioner notice of his right to institute a civil action against respondents within 30 days (*ibid.*).[2]

Within 30 days of receipt of that notice, petitioner brought suit against respondents in the United States District Court for the Western District of Tennessee, alleging violations of Title VII and also of 42 U.S.C. 1981, and requesting injunctive relief. Respondents moved to dismiss and for summary judgment. In June 1971 the district court dismissed the Section 1981 claims against all three respondents, on the ground that those claims were barred by the one-year Tennessee statute of limitations; the court further granted the local unions' motions for summary judgment as to the Title VII claims against them on the basis of stipulated or undisputed facts (Pet. App. 1a–3a). The court did not, however, direct entry of final judgment pursuant to Rule 54(b), Fed. R. Civ. P.

Petitioner's court-appointed attorney subsequently withdrew from the case with the permission of the court, and petitioner was allowed 30 days to obtain

[2] The statute now grants 90 days within which to bring the action after issuance of the notice. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f)(1).

other counsel (Pet. 8). Petitioner was unable to do so, and in February 1972 the court, without referring to its June 1971 order, entered judgment dismissing petitioner's "action" without prejudice (Pet. App. 4a–5a). Neither petitioner nor respondents sought review of the February 1972 order.

Petitioner brought this suit for injunctive relief three months later in the same district court, repeating all the allegations of his initial complaint (App. 4a–13a). Respondents pleaded the June 1971 order as *res judicata* and further contended that since Section 706 of the Civil Rights Act of 1964 required Title VII claims to be filed within 30 days of the issuance of the notice of right to sue and petitioner had failed to institute his second action within 30 days of the dismissal of his first, the district court lacked jurisdiction over petitioner's reasserted Title VII claims (App. 52a–57a, 94a–95a). The district court dismissed all claims against the local unions on *res judicata* grounds (Pet. App. 9a). The court further held that the Section 1981 claim against Railway Express was barred by the one-year statute of limitations (Pet. App. 10a) and that petitioner's failure to reinstitute his civil action within 30 days had deprived the court of jurisdiction over his Title VII claims (Pet. App. 10a–12a).

The court of appeals, without addressing respondent's *res judicata* contentions,[3] affirmed on the grounds

[3] The local unions, but not Railway Express, assert *res judicata* here as an alternative ground for affirming the judgment below (Unions Br. 11–12). We take no position on the merits of that contention. We note, however, that since the *res judicata* issue was not decided by the court of appeals, this Court could remand for consideration of that issue if the tolling question is decided in petitioner's favor.

that petitioner's Section 1981 claims against all respondents were barred by the statute of limitations and that the district court had lacked jurisdiction over petitioner's reasserted Title VII claims (Pet. App. 13a–21a).

In its opinion denying rehearing, the court of appeals specifically rejected petitioner's contention that the filing of his Title VII charges with the Commission had tolled the running of the period of limitations with respect to his Section 1981 claims (Pet. App. 25a–26a). This Court granted the petition for a writ of certiorari to consider that contention.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner's Section 1981 claims allege that respondents committed racially discriminatory acts of a continuing nature during and prior to June 1967 (App. 5a–6a). Since the federal statute prescribes no period of limitation for such claims, the applicable limitation period is that which would under state law apply to the most closely analogous state action. See, *e.g.*, *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (C.A. 5); *Madison* v. *Wood*, 410 F. 2d 564 (C.A. 6). Cf. *O'Sullivan* v. *Felix*, 233 U.S. 318; *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 703–704. Applying that principle to this case, the courts below determined (Pet. App. 10a, 20a) that the relevant period of limitation was the one-year period prescribed by Tenn. Code Ann., Section 28–304. This Court denied petitioner's request for review of that determination by limiting

the grant of certiorari. Accordingly, unless, as petitioner contends, the running of the period of limitation was tolled by the filing of his Title VII charges with the Commission, his Section 1981 claims were barred after June 1968.

"Tolling" normally has the effect of suspending the operation of a statute of limitations during the pendency of an event or condition. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 560–561. Petitioner filed his Title VII charges with the Commission in May 1967 (Pet. 5–6), but he did not receive notice of his right to sue until January 1971 (Pet. 6). If the filing of those charges tolled the running of the period of limitation, petitioner was entitled to bring suit under Section 1981 any time prior to January 1972. He in fact brought suit in February 1971 (Pet. 6).

Petitioner's initial action was dismissed without prejudice in February 1972 (Pet. App. 4a–5a), by which time the statute of limitations, even if tolled, had run.[4] However, the state savings statute permits actions to be reinstituted within one year of a dismissal without prejudice (Tenn. Code Ann., Section 28–106), and petitioner's second civil action was timely under that statute, which presumably governs the Section 1981 claim. See 28 U.S.C. 1652; 42 U.S.C. 1988.[5]

[4] Petitioner has suggested (Pet. 11, n. 8) that the institution of the first action itself tolled the running of the limitation period as to the second action. However, petitioner did not present that question in his petition for a writ of certiorari and it is not now before the Court.

[5] The court of appeals held (Pet. App. 23a–24a) that the state savings statute did not apply to petitioner's Title VII claims, on the ground that 42 U.S.C. (1970 ed.) 2000e–5(d), which required such claims to be instituted within 30 days of the issuance of a notice of right to sue, by necessary implication required dismissed claims to be reinstituted within 30 days of dismissal; this Court denied petitioner's request for review of that determination. But respondents do not contend that the 30-day provision, rather than the state savings statute, applies to the reinstitution of petitioner's Section 1981 claims. See *Moore* v. *Fields*, 464 F. 2d 549 (C.A. 6). Respondents rest their case on *res judicata* (see note 3, *supra*) and the untimeliness of the original action.

Our submission is that the tolling principle is applicable here. We reach that conclusion by considering both the congressional purpose behind Title VII and the policy underlying statutes of limitations. The burden of our argument is that tolling the time allowed for filing a Section 1981 suit while the Equal Employment Opportunity Commission is attempting to conciliate the dispute (1) serves the congressional objective of discouraging (without prohibiting) premature judicial intervention, and (2) does so without offending the policies underlying statutory limitations periods.

ARGUMENT

A. THE CONGRESSIONAL PURPOSE IS EFFECTUATED BY PERMITTING AN INDIVIDUAL AGGRIEVED BY EMPLOYMENT DISCRIMINATION TO DELAY BRINGING SUIT UNDER SECTION 1981 UNTIL AFTER ISSUANCE OF THE NOTICE OF HIS RIGHT TO SUE UNDER TITLE VII

1. AN INDIVIDUAL AGGRIEVED BY EMPLOYMENT DISCRIMINATION MAY REASONABLY DESIRE TO ASSERT CLAIMS FOR RELIEF UNDER BOTH SECTION 1981 AND TITLE VII

Title VII of the Civil Rights Act of 1964 was enacted by Congress "to assure equality of employment op-

portunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. Title VII both creates statutory rights against invidious discrimination and establishes a comprehensive scheme for the vindication of those rights.

An individual aggrieved by employment discrimination is entitled under Title VII to bring charges of unfair employment practice to the Equal Employment Opportunity Commission, which is vested with the "authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." *Ibid.* If the Commission fails to obtain voluntary compliance and decides not to bring suit on behalf of the claimant, the claimant may do so himself. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. The federal district courts are empowered to appoint counsel for plaintiffs alleging discrimination, authorize the commencement of the action without the payment of fees, costs, or security, and grant attorneys' fees in meritorious cases. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e) and (k). Where unlawful discrimination is proven, the courts may award back pay and "order such affirmative action as may be appropriate." 42 U.S.C. (1970 ed., Supp. II) 2000e–5(g). Back pay may not, however, be awarded for a period more than two years prior to the filing of charges with the Commission. *Ibid.* Several courts have also concluded that neither compensatory nor punitive

damages are available under Title VII. See, *e.g.*, *Loo* v. *Gerarge*, 374 F. Supp. 1338 (D. Ha.); *Howard* v. *Lockheed-Georgia Co.*, 372 F. Supp. 854 (N.D. Ga.); *Van Hoomissen* v. *Xerox Corporation*, 368 F. Supp. 829 (N.D. Cal.). But see *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich.), appeal pending; *Humphrey* v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex.), reversed on other grounds, 488 F. 2d 691 (C.A. 5).

Although Title VII was designed as a comprehensive solution to the problem of invidious employment discrimination, Congress intended individuals aggrieved by such discrimination to have available parallel or overlapping remedies; such individuals are not limited to seeking relief only under Title VII. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48. In particular, Congress understood "that the remedies available to the individual under Title VII are coextensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H. Rep. No. 238, 92d Cong., 1st Sess., p. 19. See also S. Rep. 415, 92d Cong., 1st Sess., p. 24. Indeed, in considering the Equal Employment Opportunity Act of 1972 the Senate specifically rejected an amendment that would have deprived employees aggrieved by racial discrimination of their right to sue under Section 1981. See 118 Cong. Rec. 3371–3373 (1972). Con

gress therefore clearly intended that such employees should be permitted to pursue their rights under both Title VII and Section 1981. Cf. *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 413–417.[6]

Section 1981 grants to all persons the right to be free of racial discrimination in the making and enforcement of contracts. Individuals who establish a cause of action under Section 1981 are entitled to both legal and equitable relief, including compensatory and, in some circumstances, punitive damages. See, *e.g.*, *Caperci* v. *Huntoon*, 397 F. 2d 799 (C.A. 1), certiorari denied, 393 U.S. 940; *Mansell* v. *Saunders*, 372 F. 2d 573 (C.A. 5). Cf. *Jones* v. *Alfred Mayer Co.*, *supra*, 392 U.S. at 414–415, n. 14. An award of compensatory

[6] Though this Court has never expressly held that Section 1981 bars private contractual discrimination, *Jones* v. *Alfred Mayer Co.*, *supra*, 392 U.S. at 413, held that Section 1982, the related provision barring housing discrimination, prohibits "*all* racial discrimination, private as well as public," and intimated that Section 1981 has a like coverage. See 392 U.S. at 441–443, n. 78. Applying the reasoning of that decision, the courts of appeals have unanimously concluded that Section 1981, derived like Section 1982 from Section 1 of the Civil Rights Act of 1866, prohibits employment discrimination on the basis of race. See, *e.g.*, *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2); *Young* v. *International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (C.A. 4), certiorari denied, 409 U.S. 982; *Caldwell* v. *National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916; *Long* v. *Ford Motor Co.*, 496 F. 2d 500 (C.A. 6); *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476 (C.A. 7), certiorari denied, 400 U.S. 911; *Brady* v. *Bristol-Meyers, Inc.*, 459 F. 2d 621 (C.A. 8); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 (C.A.D.C.). Respondents do not challenge those decisions here, and therefore the question of the scope of Section 1981 is not before the Court.

back pay under Section 1981 is not subject to the two-year limitation imposed upon recoveries under Title VII.

Section 1981 and Title VII are not coextensive in their coverage. Certain employers are excluded from the coverage of Title VII. See 42 U.S.C. 2000e(b). Section 1981 contains no express exclusions. Title VII applies only to employment relationships; Section 1981 protects all contractual relationships. On the other hand, Title VII expressly bars discrimination on the basis of sex, religion, and national origin, whereas some courts have concluded that the prohibitions of Section 1981 do not extend to all those forms of discrimination. See, *e.g.*, *Willingham* v. *Macon Telephone Publishing Co.*, 482 F. 2d 535 (C.A. 5), rehearing *en banc* granted, 482 F. 2d 542. But see *Guerra* v. *Manchester Terminal Corp.*, No. 73–1907 (C.A. 5), decided July 31, 1974; *Baker* v. *Chicago, Fire and Burglary Detection, Inc.*, 489 F. 2d 953 (C.A. 7). Cf. *Pierce* v. *United States*, 146 F. 2d 84 (C.A. 5).

Title VII also offers the aggrieved individual special assistance—*e.g.*, investigations, conciliation machinery, legal counsel, waiver of court costs, and attorneys' fees—unavailable under Section 1981. But for individuals alleging that employers covered by Title VII have discriminated against them on the basis of race, the substantive protections of the two statutes are quite similar. The principal remedial difference is that punitive damages and more ample back pay may be awarded under Section 1981. This difference may,

however, in some instances be of substantial importance. Thus, where the aggrieved individual has apparently valid claims for back pay for a period more than two years prior to the filing of charges with the Commission or presents a case arguably appropriate for the award of punitive damages, he may reasonably desire to bring suit under Section 1981 as well as Title VII.

2. CONGRESS DID NOT INTEND TO COMPEL AN AGGRIEVED INDIVIDUAL TO SUE UNDER SECTION 1981 PRIOR TO COMPLETION OF THE COMMISSION'S EFFORTS TO OBTAIN VOLUNTARY COMPLIANCE

The legislative history referred to above (pp. 11–12, *supra*) shows a congressional intent that Section 1981 rights be immediately enforceable in court without prior resort to the administrative machinery established under Title VII. As Senator Clark, one of the leading proponents of the bill, explained to his colleagues, "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." 110 Cong. Rec. 7207 (1964). Cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229. The courts of appeals have generally understood that the filing of Title VII charges is not a prerequisite to the initiation of an action under Section 1981. See *Young* v. *International Telephone & Telegraph Co., supra; Caldwell* v. *National Brewing Co., supra; Long* v. *Ford Motor Co., supra. Contra: Waters* v. *Wisconsin Steel Works of International Harvester Co., supra.* This approach

merely gives due recognition to the fact that Congress intended independent rights to be independently enforceable. See generally *Alexander* v. *Gardner-Denver Co., supra.*[7]

By the same token, however, Congress intended that judicial protection against employment discrimination normally would be invoked only upon the completion of the Commission's efforts to obtain voluntary compliance with Title VII. It was hoped that the elimination of employment discrimination on account of race would be achieved primarily through conciliation and persuasion. The premature initiation of private suits may in many instances frustrate that hope by interfering with the Commission's conciliation efforts. If, for example, the litigation fails for one reason or another, whether or not related to the merits, that would seriously weaken the Commission's ability to induce voluntary compliance. But even if the private plaintiff succeeds in obtaining full relief from discrimination against himself, final disposition

[7] We note that Title VII itself contemplates that some private suits for enforcement of Title VII rights may be brought while charges are still pending before the Commission. Thus Title VII claimants may in some instances be entitled to preliminary injunctive relief before the Commission takes any action with respect to their charges. *Drew* v. *Liberty Mutual Insurance Co.*, 480 F. 2d 69 (C.A. 5), certiorari denied, June 3, 1974, No. 73-312. Such claimants are also entitled to bring suit for back pay and permanent injunctive relief if the Commission does not obtain voluntary compliance within 180 days, even if conciliation efforts have not yet begun or are still under way. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(f).

of the individual cause of action could tend to reduce the employer's incentive for voluntarily entering a more general conciliation agreement covering all employees and all forms of discrimination. To compel an aggrieved individual to sue under Section 1981 prior to completion of the Commission's efforts to obtain voluntary compliance would undercut Title VII's emphasis on conciliation, persuasion, and voluntary compliance.[8]

That is the effect of the holding below. State limitation periods for Section 1981 claims frequently are, as is true here, quite short. See, *e.g.*, *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala.). Because of its large backlog of cases and limited budget, the Commission often is unable to initiate compliance efforts within those limitation periods. See *Chromcraft Corp.* v. *Equal Employment Opportunity Commission*, 465 F. 2d 745 (C.A. 5). Accordingly, unless the running of the limitation period for filing Section 1981 claims is tolled during the pendency of unlawful employment practice charges before the Commission, many aggrieved individuals would be compelled to bring suit prematurely under Section

[8] It would be inappropriate to require the aggrieved individual to bring suit under Section 1981 prior to completion of conciliation efforts but then to stay or delay proceedings until the Commission acts. Such a requirement would simply create "a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." *Crown Cork Front Co., Inc.* v. *United States*, 386 U.S. 503, 515.

1981, and thereby risk disruption of conciliation efforts, or to forego their rights under that statute.[9]

There is no basis in either Section 1981 or Title VII, or their respective legislative histories, for imposing such a Hobson's choice. Title VII's policy in favor of the voluntary resolution of employment discrimination claims should be accommodated by tolling the running of the limitation period applicable to Section 1981 claims during the pendency of charges before the Commission.[10]

[9] Respondent Railway Express contends (Railway Express Br. 7) that this case should be governed by the state tolling statute rather than by federal equitable tolling principles. But it is well settled that when federal courts sit to enforce federal rights, they have a duty to apply federal equity principles: "[w]hen Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395. See also *Movicolor Limited* v. *Eastman Kodak Company*, 288 F. 2d 80 (C.A. 2), certiorari denied, 368 U.S. 821.

[10] To be sure, it is arguable that the policy of encouraging conciliation and deferring judicial intervention until the mediation efforts of the Commission have failed could be served by merely *extending* the limitation period for bringing suit under Section 1981 to the last date on which suit may be brought under Title VII. Cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. The result here would presumably be that petitioner's second suit would be barred as to the Section 1981 claim for the same reason that the Title VII claim was held out of time—that the state savings statute is inapplicable. See note 5, *supra*. In our view, however, there is no reason, in this context, to depart from the normal rule, which is that "tolling" entails a *suspension* of the period of limitation, thereby allowing the plaintiff whatever time remains under the applicable state statute, as well as the benefit of any savings statute.

B. THE RUNNING OF THE LIMITATION PERIOD FOR BRINGING SUIT UNDER SECTION 1981 WOULD SERVE NO PURPOSE DURING THE PENDENCY OF TIMELY TITLE VII CHARGES BASED UPON THE SAME FACTUAL ALLEGATIONS

The policies underlying statutory limitation periods would not be served by barring suits under Section 1981 for racially discriminatory employment pactices while charges based upon the same factual allegations are still pending before the Commission. The purpose of a statute of limitation is to protect defendants against the prejudice and unfair surprise that may attend the revival of stale claims. As this Court explained in *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–349:

> Statutes of limitation * * * are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

These equitable considerations are not present when the plaintiff in an action under Section 1981 has previously filed timely Title VII charges based upon the same factual allegations. Such charges are required to be filed promptly, ordinarily within 180 days of the alleged discriminatory acts. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(e). The Commission in turn is required

to provide the employer with notice of the charges within 10 days after the date of filing. 42 U.S.C. (1970 ed., Supp. II) 2000e–5(b). And the Commission's regulations provide that "the respondent employer shall preserve all personnel records relevant to the charge * * * until [its] final disposition * * *." 29 C.F.R. 1602.14(a). Thus the filing of timely Title VII charges promptly puts the employer on notice of a claim of unlawful discrimination and ensures that the employer will preserve all relevant evidence and thus substantially protect himself against the prejudice that might otherwise be suffered over the course of time.

Where a defendant is neither surprised nor prejudiced by delay in the institution of a civil action, the operation of a time bar acts merely as an arbitrary rule of convenience that serves no equitable purpose. Indeed, equitable considerations may be said to weigh in favor of a plaintiff who has made timely assertion of his rights in a manner that puts the defendant on notice and allows him to protect himself against prejudice.[11] This Court acknowledged the force of such equitable considerations in *American Pipe & Construction Co.* v. *Utah, supra,* and *Burnett* v. *New York Central R. Co.*, 380 U.S. 424. In *American Pipe,* the Court held that the initiation of a timely class action tolled the running of the limitation period

[11] Those equitable considerations presumably underlie state savings statutes, such as Tenn. Code Ann., Section 28–106, that permit an action to be reinstituted following a dismissal without prejudice after the limitation period has run. Where such statutes preserve the plaintiff's interests, recourse to the judiciary's equitable power to toll the running of the limitation period is unnecessary. But see note 12, *infra*.

as to individual members of the class, who were thereby enabled to institute separate actions after the district court held that the suit was inappropriate as a class action. Similarly, in *Burnett* the initiation of a timely Federal Employers' Liability Act suit in state court was held to have tolled the running of the limitation period with respect to a later suit brought in federal court after the state proceeding had been dismissed for improper venue.[12]

This case admittedly differs from *American Pipe* and *Burnett* in that the right asserted by petitioner before the Commission had a different statutory origin from the one he is now attempting to vindicate. But the fact that the plaintiffs were in each case merely reasserting a single statutory right for the second time was not critical to the Court's analysis in *American Pipe* and *Burnett;* the Court's decisions in those cases rested upon its conclusion that each plaintiff had by his prior action given the defendant timely notice in a manner that "fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period." *American Pipe & Construction Co.* v. *Utah, supra,* 414 U.S. at 558. When the right first asserted has a different statutory origin from that which forms the basis for a subsequent request for relief, the question under *American Pipe* and *Burnett* would appear to be whether the two distinct statutory rights are essen-

[12] This Court concluded that an equitable tolling principle, rather than the state savings statute, should control the timeliness of the second action in *Burnett*, in order that the federal statute of limitation for FELA suits would operate uniformly throughout the nation. 380 U.S. at 434–436.

tially equivalent in substance, so that a claim under one rests upon the same facts as, and gives notice of the existence of, a claim under the other. See *Berry* v. *Pacific Sportfishing, Inc.*, 372 F. 2d 213 (C.A. 9), certiorari denied, 389 U.S. 821 (holding that the running of the three-year limitation period under the Jones Act is tolled during the pendency of a state wrongful death action). See also *Sanchez* v. *Trans World Airlines, Inc.*, 499 F. 2d 1107 (C.A. 10); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (C.A. 7); *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779 (C.A. 9); and *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5) (all holding that resort to the grievance-arbitration provisions of a collective bargaining agreement tolls the running of the limitation period under Title VII).

As we have shown above (pp. 9–14, *supra*), claims of racially discriminatory employment practices under Section 1981 and Title VII are essentially equivalent in substance. The filing of petitioner's charges under Title VII clearly put respondents on notice that petitioner also had a grievance under Section 1981. Accordingly, that filing, like the initial lawsuits in *American Pipe* and *Burnett*, "fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period." *American Pipe & Construction Co.* v. *Utah, supra.*

These considerations led two other courts of appeals in earlier cases to conclude that the filing of Title VII charges of unlawful employment practices with the Commission tolls the running of the limitation period with respect to Section 1981 suits based upon the same

factual allegations. *Macklin* v. *Spector Freight Systems, Inc., supra,* 478 F. 2d at 994, n. 30; *Boudreaux* v. *Baton Rouge Marine Contracting Co.,* 437 F. 2d 1011, 1017, n. 16 (C.A. 5). The court of appeals below erred in not following those decisions.

CONCLUSION

The court of appeals erred in holding that the filing of timely Title VII charges of unlawful employment practices with the Equal Employment Opportunity Commission does not toll the running of the limitation period with respect to Section 1981 suits based upon the same factual allegations.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
KEITH A. JONES,
Assistant to the Solicitor General.
DAVID L. ROSE,
MICHAEL A. MIDDLETON,
Attorneys.

WILLIAM A. CAREY,
General Counsel,
JOSEPH T. EDDINS,
Associate General Counsel,
CHARLES L. RIESCHEL,
CHARLES S. P. HODGE,
Attorneys,
Equal Employment Opportunity Commission.

OCTOBER 1974.

U.S. GOVERNMENT PRINTING OFFICE 1974

Supreme Court U. S.
FILED
NOV 22 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

REPLY BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JAMES L. HIGHSAW
Highsaw & Mahoney
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036
Attorney for Respondents Brotherhood of Railway Clerks Tri-State Local and Lily of the Valley Local

November 22, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

REPLY BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, among the respondents in the above-entitled case, submit this brief to the Court in reply to the brief filed by the United States as *amicus curiae.*

I

THE RES JUDICATA ASPECTS

The *amicus* brief (page 6) correctly states that the District Court dismissed all claims against the respondent Local Unions on *res judicata* grounds. However, such brief (page 6 and footnote 3) incorrectly states that the Court of Appeals did not address itself to respondents' *res judicata* contentions, that the union respondents assert *res judicata* here as an alternative ground for affirming the judgment below, and that since the *res judicata* issue was not decided by the Court of Appeals, this Court could remand that issue for consideration if the tolling question is decided in petitioner's favor.[1]

The Court of Appeals did not address itself to the *res judicata* aspects of the case in its original decision because it found a lack of jurisdiction (105a-113a). However, that Court did address itself to the issue on the petition for rehearing. In its opinion on that petition, footnote 1 (115a), the Court of Appeals stated as follows:

> "We agree with the District Court that the unions have a complete defense on the grounds of *res judicata,* and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned."

Moreover, the Local Unions did not, as the *amicus* brief states, urge in their own brief *res judicata* as an alternative ground for affirming the judgment below. The Local Union respondents addressed themselves in

[1] The *amicus* brief also states in footnote 3 that the United States takes no position on the merits with respect to *res judicata*.

their brief to this Court on the *res judicata* aspects of the case only because the petitioner's brief (page 8) requested this Court to remand the *res judicata* issue to the Court of Appeals for reconsideration and clarification. The brief of the Local Unions pointed out that the petition for a writ of certiorari in the present case requested this Court to review the ruling of the Court below affirming the dismissal of the petitioner's claims under both statutes against the unions on the grounds of *res judicata,* and that this Court did not grant the request. No petition for rehearing with respect thereto was filed by petitioner. The Local Unions, therefore, took the position in their brief (page 12) that the denial by this Court of the petition for certiorari on the *res judicata* issue constitutes a final judgment in the case in favor of the respondent unions and there is now no issue before this Court which can be remanded to the Court of Appeals with respect to these local unions regardless of what decision the Court may make with respect to the tolling issue.[2]

[2] There are also other inaccuracies in the statement of facts in the *amicus* brief. On page 5 the *amicus* brief states that the Commission's conciliation efforts failed to bring respondents into voluntary compliance and that in January 1971 the Commission accordingly issued petitioner a right-to-sue notice and that petitioner brought suit pursuant to this notice. The record does not show what, if any, efforts the Commission undertook with respect to conciliation. On page 6 the *amicus* brief states that petitioner was unable to obtain an attorney within the 30 days allowed him by the District Court's order of January 14, 1972. The record does not show what, if anything, petitioner did during these 30 days to obtain counsel. It shows only that on February 17, 1972, attorney William E. Caldwell wrote to the District Court advising, among other things, that petitioner had contacted him regarding representation (45a).

II

THE TOLLING ISSUE

The *amicus* brief argues that an applicable state statute limiting the time within which an action may be brought under Section 1981 of Title 42 of the United States Code should be tolled by the filing and pendency of a Title VII charge before the Federal Equal Employment Opportunity Commission because such a result serves the Congressional objective of conciliation and premature judicial intervention without offending the policies underlying statutory limitations.

The record does not support the conclusion that the application of the tolling principle in the present case serves any such Congressional objective because there is no record with respect to EEOC conciliation efforts. Moreover, as applied to future actions the argument is a theoretical one made without regard to the realities of the situation as set forth in the brief of the Local Union respondents.

The entire *amicus* brief is predicated on the assumption that the purposes of Title VII are, if at all possible, to conciliate discrimination disputes and avoid Court actions. Although the desirability of conciliation undoubtedly helped to mold Title VII, the fact is that the statute itself comes very close to totally shooting down conciliation by the provision that a right-to-sue letter may be obtained after 180 days even if no conciliation has been undertaken. This is particularly true in light of the fact (*amicus* brief page 10) that because of a large backlog of cases and limited budget, the EEOC often is unable to initiate compliance efforts ever within the limitation periods of state statutes of limitations. The *amicus* brief argues that, because of this fact, unless the running of the state statute is tolled with respect to Section 1981 by the filing of a discrimination charge with the EEOC, many aggrieved individuals would be compelled to bring suit prematurely under Section 1981 and thereby risk disruption of conciliation efforts. However, the combination of the Congressional action in permitting a suit within 180 days without conciliation plus the inability of the EEOC to act within the period of state statutes of limitations (usually one to three years) has created strong incentives for aggrieved individuals to bring suit without any conciliation efforts. The situation set forth by the *amicus* brief, therefore argues strongly against the tolling principle rather than in support of it. The argument of the *amicus* brief that the policy of Title VII in favor of voluntary resolution of employment discrimination claims should be accommodated by application of the tolling principle is, as a practical matter, substantially meaningless.

The *amicus* brief also argues that the application of the tolling principle in this situation would not offend policies underlying statutory limitation periods. Again, this argument is made almost in a total vacuum without any regard to realities. The *amicus* brief contends that the timely filing of a Title VII charge promptly puts respondents on notice with respect to a discrimination claim. While an EEOC notice does indicate that there is a claim, such a notice provides no details. Moreover, there is no guarantee of even such a sparse notice because Federal Courts have held in the decisions cited at page 15 of the respondent unions' brief that the EEOC does not have to serve the respondent with such a notice prior to the institution of a Title VII suit. The cases cited by the union respondents show that a defendant may not even know

there is a discrimination claim until suit is filed against him in Court, much less the substance of the claim.[3] Thus, defendants are and can be surprised and prejudiced by delay in the institution of a civil action pending EEOC action or inaction. In the realities of the situation either one of two things will occur. The plaintiff may request a right-to-sue notice on the 181st day after the filing of the charge on shortly thereafter so that the Title VII provisions have served no purpose other than the mechanical one of filing the charge, or the plaintiff may sit and wait for conciliation which may never come because of governmental inadequacy. As a consequence, the suit which is finally filed without conciliation may very well be filed years after the claimed discrimination. Thus, a defendant may be litigating matters which occurred years before. In the present case, the original charge was filed on May 31, 1967 (15a), and referred to alleged discrimination substantially prior thereto and the original complaint was not filed in Court until March of 1971. Even in 1971 defendants would have been litigating charges many years old. This situation is bad enough as applied to Title VII actions and it creates a very strong reason why the tolling principle should not be applied to Section 1981 actions with respect to EEOC charges. The application of such principle will not aid conciliation if the plaintiff promptly asks for a right-to-sue letter and it will completely defeat the purposes of the statutes of limitations against litigating stale claims if

[3] BRAC is a party to just such a case now pending before the United States District Court for the Eastern District of Virginia (*Coleman* v. *Seaboard Coast Line Railroad, et al.* (Civil Action No. 173-73-R)), wherein it learned of a claim when the complaint was filed. The District Court agreed with the cited cases and, among other things, refused to remand for conciliation.

the plaintiff waits for conciliation which never comes. The *amicus* brief, in arguing that the application of the tolling principle would not defeat the purposes of statutes of limitations, did not address itself at all to this problem.

Equities are obviously a two-way street. There is no equity for defendants who can be victims of frivolous discrimination claims in basing the law upon a theoretical principle of conciliation by the Federal Commission when the statute and the realities of administration make conciliation difficult if not impossilbe. Nor is there any merit to an argument that equitable considerations weigh in favor of a plaintiff who has made timely assertion of his rights in a manner that puts a defendant on notice and allows him to protect himself from prejudice when the realities of the situation are that in practice it does not do so.

CONCLUSION

It is respectfully submitted that the *amicus* brief does not demonstrate any basis for granting the relief requested by the petitioner nor does it even address itself to the substantial real problems that are involved.

Respectfully submitted,

JAMES L. HIGHSAW
Highsaw & Mahoney
Suite 506
1015 Eighteenth Street, N. W.
Washington, D. C. 20036
Attorney for Respondents Brotherhood of Railway Clerks Tri-State Local and Lily of the Valley Local

November 22, 1974

Supreme Court, U. S.
FILED
DEC 3 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF FOR RESPONDENT REA EXPRESS, INC. IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
MICHAEL L. MARTELL
PETER G. WOLFE
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Factual Statement 2

ARGUMENT

I. The Legislative History Is Contrary to the Position Taken in the *Amicus* Brief 3

II. A Chaotic Procedural Situation Would Develop From the Position Advocated in the *Amicus* Brief 6

III. Our Legal System Has Advanced Beyond *Peine Forte Et Dure* 6

IV. The *Amicus* Brief Is Premised Upon Speculations for Which There Is No Legal Basis 9

V. Picking and Choosing From Among Favorable Statutory Provisions and Ignoring the Others Is Not Statutory Construction 10

VI. Tolling Is Not Appropriate in the Circumstances of This Case 12

CONCLUSION 15

PAGE

Table of Authorities

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) .. 9
American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 12
Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974) 11
Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 8, 13

Bell v. Aerodex, Inc., 473 F.2d 869 (5th Cir. 1973) 11
Blair v. Page Aircraft Maintenance, Inc., 467 F.2d 815 (5th Cir. 1972) 11
Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971) 10
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 12

Curtis v. Loether, 415 U.S. 189 (1974) 6

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 12
Hughes v. Smith, 264 F. Supp. 767 (D.C.N.J. 1967), aff'd 389 F.2d 42 (3d Cir. 1968) 11

Jones v. Alfred Mayer Co., 392 U.S. 409 (1966) 4

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 10
McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) 9
Moviecolor Limited v. Eastern Kodak Company, 288 F.2d 80 (2d Cir. 1961) 11, 12

PAGE

Order of Railway Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 12

Statutes:

Civil Rights Act of 1866, 42 U.S.C. §1981, *et seq.* ....*passim*

Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ....*passim*

Equal Employment Opportunity Act of 1972, 86 Stat. 104 4

Tenn. Code Ann.:
Section 28-106 .....10, 11
Section 28-301 14

Miscellaneous:

Supreme Court:
Rule 41(3) 1
Rule 42(2) 2
Rule 42(4) 2

110 Cong. Rec. 13650-52 (1964) 4

House Education and Labor Committee Rep. No. 238, U.S. Code Congressional and Administrative News, 92d Cong., 2d Session (1972) 5

S. Rep. No. 415, 92d Congress, 1st Session (1971) 4

4 *Blackstone's Commentaries*, 324-8 (1775) 6

Goldberg, "Implying Punitive Damages in Employment Discrimination Cases," 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 325 (1974) 9

Knappen, *Constitutional and Legal History of England* 197 (1942) 6

In the

Supreme Court of the United States

October Term, 1974

No. 73-1543

Willie Johnson, Jr.,

Petitioner,

—v.—

Railway Express Agency, Inc., Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local,

Respondents.

REPLY BRIEF FOR RESPONDENT REA EXPRESS, INC. IN RESPONSE TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

Preliminary Statement

Respondent Rea Express, Inc. ("REA") submits this brief pursuant to Rule 41(3) in reply to the untimely *amicus* brief filed by the United States.

This Court invited the Solicitor General to file a brief, as *amicus curiae*, expressing the views of the United States at the time it granted certiorari (No. 73-1543, 42 U.S.L.W. 3666 (June 3, 1974)).

Briefing by the parties herein was completed in the third week in August, yet the *amicus* brief was not mailed until October 10, 1974.

Rule 42(2) of the Court provides:

> "A brief of an *amicus curiae* in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case *and presented within the time allowed for the filing of the brief of the party supported.*" (Emphasis added.)

Although Rule 42(4) provides that consent need not be obtained when the brief is filed on behalf of the United States by the Solicitor General, it does not waive or in any manner modify the requirements governing the time within which to file the *amicus* brief. Since the *amicus* brief of the United States clearly supports the position taken by the petitioner, it should have been filed on or before July 18, 1974, and not nearly three months after that date.

Factual Statement

The *amicus* brief erroneously states that the acts of discrimination charged include hiring practices (Br. 4). However, discrimination in hiring practices was not charged and is not an issue in this case (Appendix 6a, 15a). The alleged acts of discrimination with respect to REA involve job assignments, promotions, and disciplinary procedures (6a), not REA's hiring policy or practices.

The *amicus* brief erroneously contends that REA does not assert *res judicata* as an alternate ground for affirming the judgment below (Br. 6, fn. 3). Certiorari was requested but denied on the question of whether the prior judgment had a *res judicata* effect (*Petition,* p. 3, question 2(c)). REA therefore did not address the question in its brief on the merits. However, REA's position that the prior judgment

did constitute *res judicata* is made clear by REA's brief opposing certiorari (Br. 21) as well as its answer in the District Court (Answer, ¶¶2, 8; Appendix, 52a, 54a).

ARGUMENT

I.

The Legislative History Is Contrary to the Position Taken in the *Amicus* Brief.

According to the *amicus* brief, Congress intended that litigation "normally" would be resorted to only upon the completion of the Commission's conciliation efforts; it is said that earlier litigation would "frustrate" that intention "by interfering with the Commission's conciliation efforts" (Br. 15).

Neither Title VII nor the legislative history of the Civil Rights Act of 1964 supports the intention ascribed to Congress by the *amicus* brief. On the contrary, both the legislation and the legislative history point in the opposite direction.

Title VII contemplates that private suits thereunder may be pursued even if conciliation efforts have not begun or are still underway, as the *amicus* brief itself acknowledges (Br. 15, fn. 7). Having specifically authorized Title VII suits to be brought while conciliation is pending, Congress surely did not intend a different result with respect to suits under the 1866 Act.

After passage of the Civil Rights Act of 1964, this Court addressed the question of whether private discrimination

actions might be brought under the Civil Rights Act of 1866 in *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409 (1966).

Petitioners in *Jones* alleged that the respondents violated Section 1982 of the 1866 Act which, it was alleged, prohibited private discrimination in the sale or rental of housing. At the time, Congress was considering a comprehensive housing law. Accordingly, the Court addressed itself to the same issue as in this proceeding, *i.e.*, what effect, if any, would the new, comprehensive civil rights legislation have upon private rights under the 1866 Act (392 U.S. 409 at 417). The answer was clearly stated:

> "The Civil Rights Act of 1968 does not mention 42 U.S.C. §1982, and *we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute.*" (392 U.S. 409 at 416-417, fn. 20; emphasis added.)

Thus, when Congress came to consider the civil rights amendments of 1972, this Court had already indicated that subsequent civil rights legislation cannot be assumed to have any effect, "either substantive or procedural," upon the 1866 Act.

In considering the 1972 Equal Employment Opportunity Act, Congress rejected an amendment that would have made Title VII the exclusive federal remedy for employment discrimination (110 Cong. Rec. 13650-52 (1964)). The Report of the Senate Committee emphasized that "neither the provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92d Congress, 1st Session (1971).

Not only did Congress intend *not* to affect existing rights under the Civil Rights Act of 1866, but it also stressed the importance of allowing an individual to litigate discrimination claims in a federal court notwithstanding the pendency of conciliation activities by the Commission. The right of an individual who had filed a charge with the Commission to obtain a right-to-sue letter prior to completion of the Commission's conciliation activities was retained in the 1972 amendments for a specific reason:

> "In the case of the Commission, the burgeoning workload, accompanied by insufficient funds and a shortage of staff, has, in many instances, forced a party to wait 2 or 3 years before final conciliation procedures can be instituted. *This situation leads the committee to believe that the private right of action, both under the present act and in the bill, provides the aggrieved party a means by which he may be able to escape from the administrative quagmire which occasionally surrounds a case caught in an overloaded administrative process.*" (Emphasis added.) House Education and Labor Committee Rep. No. 238, U.S. Code Congressional and Administrative News, 92d Cong., 2d Session (1972), pp. 2147-8.

How can it be maintained that Congress intended suits arising under the 1866 Act to *await* completion of Commission conciliation activities when Congress specifically stressed the desirability of making such litigation under Title VII available *prior* to that time as a means of escape "from the administrative quagmire"?

II.

A Chaotic Procedural Situation Would Develop From the Position Advocated in the *Amicus* Brief.

Damage claims in Section 1981 cases are subject to the right of trial by jury under the Seventh Amendment but the availability of a jury trial under Title VII is doubtful.* See *Curtis* v. *Loether*, 415 U.S. 189 (1974). Thus if the view in the *amicus* brief prevails, the claim of tolling with respect to Section 1981 suits will not end with EEOC proceedings: alert plaintiffs also will seek to apply the tolling argument to Title VII litigation as well so that, if the result is not favorable, a second bite of the apple can be sought in a Section 1981 case before a jury. This procedural Pandora's box should not be opened.

III.

Our Legal System Has Advanced Beyond *Peine Forte Et Dure*.

One can applaud the resuscitation of civil rights guarantees under the 1866 Act, after a century of neglect, without concluding that they should be turned into a kind of procedural *peine forte et dure*.**

---

* The result apparently will depend in part upon the availability of compensatory and punitive damages thereunder, an issue which as noted in Point IV below is still debatable.

** *Peine forte et dure* was an alternative to judicial trials in medieval England. 4 *Blackstone's Commentaries* 324-8 (1775). As to a party who stood mute and refused trial, *peine forte et dure*, or "pressing", involved piling enough weights on his chest either to extract a confession or render the dispute moot. *Knappen, Constitutional and Legal History of England* 197 (1942).

The *amicus* brief contends that *even if a private plaintiff succeeds in obtaining full relief against discrimination for himself* (p. 15), final disposition of his case would reduce an employer's incentive for "voluntarily" entering into a "more general conciliation agreement" which would have the purpose of "covering all employees and all forms of discrimination" asserted by the Commission (Br. 16), whether proved or unproved.

We submit that an attempt to hold a lawsuit in reserve, even though through it an individual claimant may more expeditiously succeed in obtaining "full relief from discrimination against himself" (Br. 15), solely so that the Commission can pile another weight on a respondent's chest to extract a "conciliation agreement," with the purpose of compelling acceptance of the Commission's *own* definition of what is required to eliminate "all forms of discrimination" with respect to "all employees," without any judicial scrutiny of the propriety of the Commission's views, particularly as to assertions of other types of discrimination not even germane to the original charge, is a kind of 1984 analogue to *peine forte et dure* which the courts should not countenance as an argument favoring "equitable tolling" and for which no support is found in existing civil rights legislation or the use of the word "conciliation." (42 U.S.C. § 2000e-5)

The Commission's argument suggests that the poor record in concluding its conciliation activities in a timely fashion is due to something other than the large backlog and limited budget assigned as the reason in the *amicus* brief (p. 16), and those reasons therefore should be rejected as a basis of decision in this case. As shown by the facts here involved, a right-to-sue letter was not issued

by the Commission until January 1971 (8a) following a "reasonable cause" determination in March 1970. This was *over three years* after the Commission's "*Final* Investigative Report" of December 22, 1967 (7a) (emphasis added). No word of explanation for the long delay is given. The "Final Investigative Report" itself is a detailed document of thirty printed pages (14a-44a). The statute itself requires the Commission to " . . . make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge. . . . " (42 U.S.C. § 2000e-5(b))

The settled policies of both the legislative and judicial branches of government favor the prompt resolution of disputes rather than saving them up to exert pressure. The purpose of statutory limitations periods as well as the equitable doctrine of laches is to avoid the litigation of stale claims. If reversal of this long-standing objective is desired, more should be required for that purpose than merely the assertion of an "equitable tolling" argument. As this Court said in rejecting a similar argument in *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 702-3 (1966):

> " . . . although a uniform [limitations period] for §301 suits might well constitute a desirable statutory addition, there is no justification for that drastic sort of judicial legislation that is urged upon us." (Footnote omitted.)

IV.

The *Amicus* Brief Is Premised Upon Speculations for Which There Is No Legal Basis.

The *amicus* brief consists primarily of arguments for which there is little if any basis other than speculation. First, the tolling contention is premised upon the hypothesis that punitive and "more adequate" compensatory damages are available under the Civil Rights Act of 1866 but not under the 1964 Act, a premise that, with cases going both ways, it is impossible to establish until this Court makes a definitive ruling on the subject. See Goldberg, "Implying Punitive Damages in Employment Discrimination Cases," 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 325, 371 (1974), contending that claims for punitive and compensatory damages are maintainable under both Acts. See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which repeatedly stresses that the federal courts have been assigned "plenary powers" to assure compliance with Title VII (pp. 45, 47).

Second, the tolling question presented by the facts of this case is whether, because of tolling, a Section 1981 action can be maintained *even though the time for bringing a suit under the 1964 Act has clearly expired by virtue of specific statutory provision.*

The Court may desire to reserve decision on whether, in an appropriate case, tolling is available to extend the time for suing on Section 1981 claims to the period during which discrimination cases might be brought under Title VII, cf. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958), a possibility mentioned in footnote 10 of the *amicus* brief, although that, too, we submit, would constitute ju-

dicial legislation.* But on the facts of this case, which involve a period *beyond* the time in which Title VII litigation may be brought, tolling clearly should not be applied to extend the time longer than what Congress thought desirable in its most recent pronouncement on the subject.

V.

Picking and Choosing From Among Favorable Statutory Provisions and Ignoring the Others Is Not Statutory Construction.

The *amicus* brief does not deny that the Tennessee Statute of Limitations applies to this proceeding by virtue of 42 U.S.C. §1988. Instead, it seeks to *avail* itself of the state *savings* statute so that it, *coupled with* tolling, would keep the Section 1981 claim open after the Title VII claim has expired (Br. 8, 17, fn. 10). But this is a perversion of the Tennessee statute and the legal process. Statutory construction surely involves something other than picking and choosing from among those statutory provisions favorable to a party's position and ignoring the others.

The *amicus* brief errs in stating that "petitioner's second civil action was timely" under the state savings statute (Br. 8). The savings statute applies *only* if the original suit was commenced in time. The opening phrase of the savings statute is "*If* the action is commenced *within the time limited by a* rule or *statute of limitation*. . . ." (Tenn.

* Neither of the two lower court decisions relied upon in the *amicus* brief (p. 22) involved the question here involved, namely, whether a state statute of limitations was tolled *beyond* the time in which a suit under Title VII could have been brought. See *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973), and *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971). In both cases, the lawsuit was still timely under Title VII, unlike the case at bar.

Code Ann. §28-106; emphasis added.) The original suit not having been commenced within the time prescribed by state statute of limitation, or tolled by the specific statutory tolling provisions (see discussion on p. 7 of REA's initial brief), the savings statute is not applicable. In such circumstances, tolling is not permitted. See *Ammlung* v. *City of Chester*, 494 F.2d 811 (3d Cir. 1974); *Hughes* v. *Smith*, 264 F. Supp. 767 (D.C. N.J. 1967), aff'd 389 F.2d 42 (3d Cir. 1968).

Reliance upon the Tennessee savings statute at the same time that the statutory tolling provisions are ignored represents not only faulty statutory construction but also an abrogation of the direction given by Congress in 42 U.S.C. §1988 that "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to *and govern* the said [district] courts in the trial and disposition of the cause . . . . " (Emphasis added.)*

* All of the lower court decisions cited on p. 21 of the *amicus* brief are alike and distinguishable in that they apply to tolling under a *federal* statute of limitations. In broadly asserting that this case is governed by "federal equitable tolling principles" (Br. 17, fn. 9), while at the same time admitting that it is otherwise subject to the state statute of limitations, the *amicus* brief ignores the recent decisions which are to the contrary. See *Ammlung, supra; Blair* v. *Page Aircraft Maintenance, Inc.*, 467 F.2d 815 (5th Cir. 1972); *Bell* v. *Aerodex, Inc.*, 473 F.2d 869 (5th Cir. 1973). The *Blair* case is particularly significant because it, like the case at bar, involved administrative delay caused by governmental agencies (there, the Departments of Justice and Labor), yet the court held that, under state law, no tolling applied. The court further observed that (467 F.2d at 820), "As a matter of policy, which is to be set by Congress and not by the Courts, our decision will strengthen, rather than impede, the speedy receipt of the remedies which Congress sought to protect." *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80 (2d Cir. 1961), certiorari denied, 368 U.S. 821, relied on in the *amicus* brief (p. 17, fn. 9), involved *dictum* not necessary for the decision and is further distinguished at pp. 12-13, *infra*.

VI.

Tolling Is Not Appropriate in the Circumstances of This Case.

The *amicus* brief entirely misconceives the doctrine of tolling applied in other cases decided by this Court. The decisions of this Court relied upon involved the tolling of limitations periods under *federal* statutes, not under applicable state statutes of limitations. Thus, *Order of Railway Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342 (1944), involved a timely suit on an Adjustment Board award within the limitations period under the Railway Labor Act; *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965), involved the three-year limitations period under the Federal Employers' Liability Act and reached a tolling result based upon the interest in national uniformity expressed in the federal legislation (p. 435); and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), involved the four-year limitation period applicable under the Clayton Act to federal antitrust suits. The opinion in *American Pipe* specifically distinguishes cases like that here involved "where Congress has been silent as to the period within which federal rights must be asserted" (414 U.S. at 556), with the holding explicitly predicated upon the time limitation found in a federal statute (414 U.S. at 556-9).

In support of its asserted doctrine of "federal equitable tolling principles", the *amicus* brief cites two cases which are not apposite here (Br. 17, fn. 9): *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946) and *Moviecolor Limited* v. *Eastern Kodak Company*, 288 F.2d 80 (2d Cir. 1961).

These cases are distinguishable from the circumstances presented in the instant case on four major grounds.

First, neither *Holmberg* nor *Moviecolor* involved a situation where the court was requested to toll the running of the limitations period as to one federal statute because of the initiation of proceedings under another. In both *Holmberg* and *Moviecolor*, the grounds for tolling were limited *to the statutes under which the plaintiffs asserted their rights*. Action taken under a second statute was not involved in either case.

Second, both *Holmberg* and *Moviecolor* involved the equitable doctrine of estoppel or fraudulent concealment which has long served as a basis for tolling the running of the statute of limitations.

Third, neither of the two federal statutes involved in *Holmberg* and *Moviecolor, viz.*, the Clayton Act and the Federal Farm Loan Act, contained a provision similar to 42 U.S.C. §1988 which specifically requires the application of *state common and statutory law* in proceedings under Section 1981 to the extent federal law is lacking.

Fourth, in *Holmberg* and *Moviecolor*, the courts were not confronted with state statutes directly forbidding the tolling of the limitations periods as this Court is in the present proceeding. In neither case was a legislative policy against tolling involved, and the courts therefore were free to fashion their own policies.

The leading decision of this Court on the subject of tolling in cases which, like this, involve no federal limitation period is *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). The decision there specifically dis-

tinguished *Burnett, supra,* relied upon heavily in the *amicus* brief (pp. 19-21), on the ground that, in *Burnett,* "a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision" (383 U.S. at 708). Finding that that was "the primary underpinning of *Burnett*" (*ibid.*), this Court refused to hold the principle applicable to a suit under Section 301 of the Labor-Management Relations Act where Congress had not expressed a national policy of a uniform time bar, and applied the state limitations provision, finding that the six months' provision governing unfair labor practice proceedings in an analogous federal labor law provision, "suggests that relatively rapid disposition of labor disputes is a goal of federal labor law" (*id.* at 707).

We submit that the case at bar presents an *a fortiori* situation to that in *Auto Workers.* Here, Congress has left no doubt that a uniform time bar is *not* "a primary underpinning" of the Civil Rights Act of 1866, and has specifically directed the courts to apply the remedial provisions of state law (42 U.S. §1988).

In summary, unlike the decisions of this Court relied upon in the *amicus* brief, this case does *not* involve the issue of tolling a federal statutory limitation period; indeed, the tolling sought here (a) would result in a longer period of time for bringing suit than Congress itself more recently provided in the most analogous statutory provision; (b) is in the face of a federal statute directing that *state* law shall apply (42 U.S.C. §1988); and (c) is contrary to the state statutory provisions specifically barring tolling in the circumstances of this case (Tenn. Code Ann. §28-301).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals on the issue of tolling should be affirmed.

Respectfully submitted,

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
MICHAEL L. MARTELL
PETER G. WOLFE
Of Counsel

Certificate of Service

I hereby certify that I have this day caused to be served the above reply brief upon Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530; Deborah M. Greenberg, Esq., Suite 2030, 10 Columbus Circle, New York, New York 10019; James L. Highsaw, Jr., Esq., Highsaw & Mahoney, Suite 506, 1015 18th St., N.W., Washington, D.C., by first class mail postage prepaid.

Dated: New York, New York
December 2, 1974